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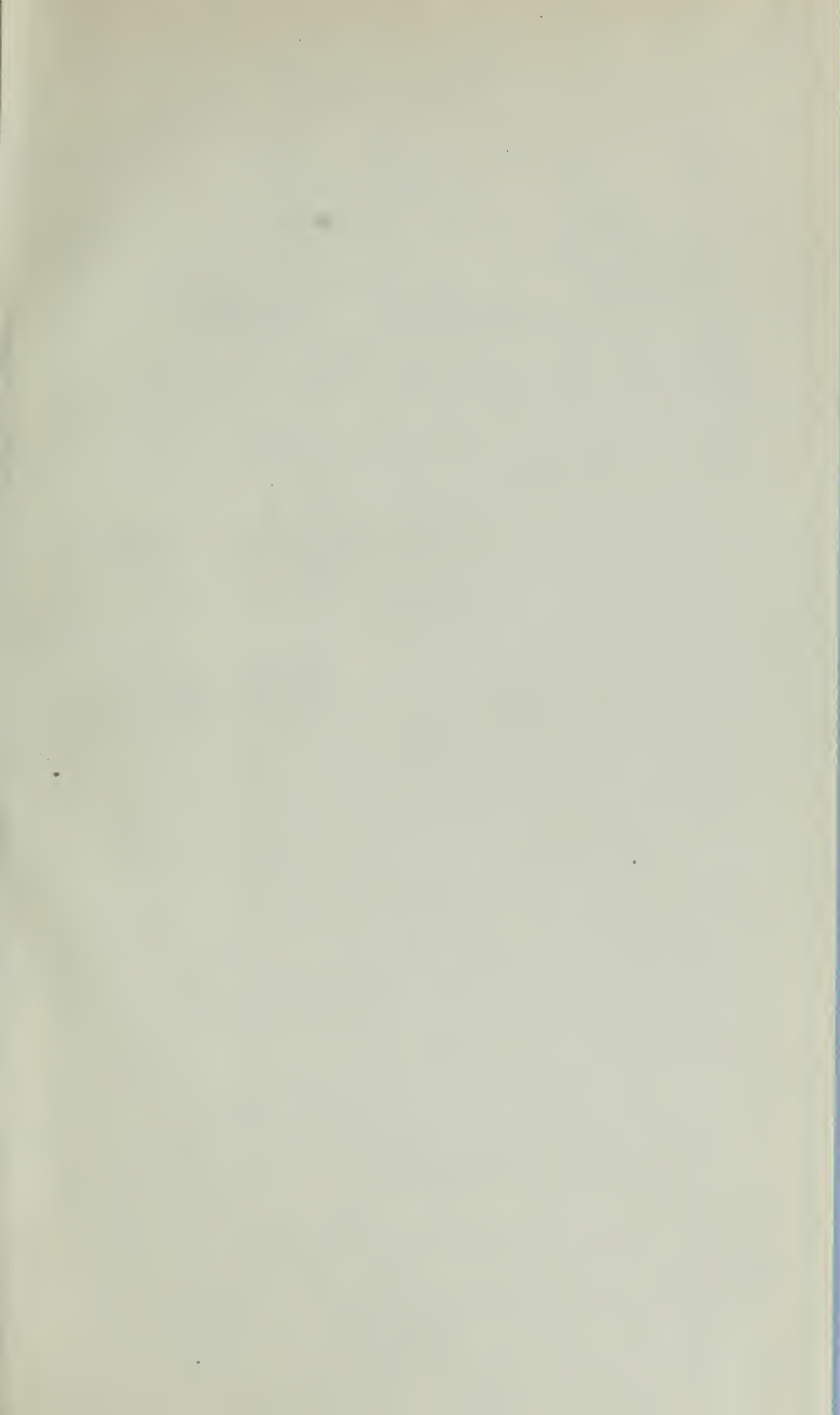
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2697 No. 12965

United States
Court of Appeals
for the Ninth Circuit

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

VS

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED
SEP 26 1951

PAUL P. OBRIEN, CLERK

No. 12965

United States
Court of Appeals
for the Ninth Circuit

HAWAIIAN FREIGHT FORWARDERS, LTD.,
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Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

LOUIS JANIN, Esq.

HAROLD E. HAVEN, Esq.

For Respondent:

W. J. McFARLAND, Esq.

T. M. MATHER, Esq.

Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

Transferred to Judge Turner 7/27/49

1948

June 14—Petition received and filed. Taxpayer notified. Fee paid.

June 15—Copy of petition served on General Counsel.

July 27—Answer filed by General Counsel.

July 27—Request for hearing in San Francisco filed by General Counsel.

Aug. 5—Notice issued placing proceeding on San Francisco calendar. Service of answer and request is hereby made.

1949

Mar. 11—Hearing set May 9, 1949, San Francisco.

May 13—Hearing had before Judge Van Fossan on merits. Stipulation of Facts with exhibits 2B attached, filed. Briefs, June 27, 1949. Replies July 18, 1949.

June 3—Transcript of Hearing 5/13/49 filed.

1949

June 27—Brief filed by taxpayer. Copy served by attorney.

June 27—Brief filed by General Counsel.

July 18—Reply Brief filed by taxpayer. Copy served by counsel.

1950

July 31—Opinion rendered J. Turner. Decision will be entered under Rule 50.

Aug. 15—Motion for correction and enlargement of findings of fact filed by petitioner.

Aug. 15—Motion to vacate findings of fact and opinion of 7/31/50 and reconsider it's determination filed by petitioner.

Aug. 15—Motion for hearing on said motions in San Francisco, Calif., or elsewhere filed by petitioner.

Aug. 22—Respondent's computation filed.

Sept. 6—Hearing set Sept. 20, 1950, Washington, D. C., under Rule 50.

Sept. 18—Motion for continuance of hearing on Rule 50 until motions of petitioner heretofore filed have been acted upon filed by petitioner.

Sept. 20—Hearing had before Judge Arundell on settlement—Referred to Judge Turner.

Oct. 17—Hearing set November 1, 1950, San Francisco, on petitioner's motion. Copy served.

1950

Nov. 1—Hearing had before Judge Turner on petitioner's motion for reconsideration. Motion for correction and enlargements of Findings of Fact denied. Motion for reconsideration denied.

Nov. 20—Transcript of Hearing November 1, 1950 filed.

Dec. 8—Order that motions be and are denied, entered.

1951

Jan. 29—Hearing set Feb. 14, 1951, Washington, D. C., under Rule 50.

Feb. 2—Consent to settlement, filed by taxpayer.

Feb. 7—Decision entered, Turner J. Div. 8.

May 4—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of Error filed by taxpayer.

May 4—Designation of record filed by taxpayer.

May 9—Proof of service of petition for review filed.

May 9—Proof of Service of Designation of record filed.

[Title of Tax Court and Cause.]

PETITION

The above named taxpayer hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols - IT:FC:GSS-150D) dated February 2, 1948; and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under the laws of the Territory of Hawaii; and having its principal office at Room 22, Campbell Block, in Honolulu, T. H. (P.O. Box 3113). The returns for the periods here involved, prepared on the accrual basis, were filed with the Collector of Internal Revenue for the District of Hawaii, at Honolulu, T. H.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to petitioner on February 2, 1948.

3. The taxes in controversy are excess profits taxes for the fiscal years ended November 30, 1943, and November 30, 1944, in the respective amounts of \$21,424.70 and \$7,403.23. The excess profits tax deficiency of \$2,703.76 asserted for the year ended November 30, 1942, is not directly in controversy, but its redetermination may prove necessary to a disposition of this proceeding.

4. The determination of tax set forth in the said

notice of deficiency is based upon the following errors:

(a) The Commissioner erred in failing and refusing to compute petitioner's excess-profits credit under the applicable provisions of "Supplement A" (Sections 740-742, I.R.C.), and without explanation in computing such credit on the invested capital basis, petitioner's returns having always been prepared and filed on the earnings basis.

(b) The Commissioner erred in failing and refusing to determine that petitioner's excess profits credit on the basis of the earnings of its predecessor partnership as required under the provisions of Sections 740 and 742 of the Internal Revenue Code as amended, such credit being \$25,279.04, and substantially greater than the credit computed under the invested capital basis.

(c) The Commissioner erred in failing to determine and compute the excess profits credit carryovers and carrybacks applicable to the years in issue from the years ended November 30th in 1941, 1942, 1944 and 1945 predicated on the credit for such years determined on the basis of the earnings of petitioner's predecessor partnership.

(d) The Commissioner erred in failing to determine either (1) that petitioner had elected to adopt the retroactive application of the amendments of Section 228 of the Revenue Act of 1942 or (2) that strict compliance with his regulation issued thereunder had been waived by him, or (3) that said regulation, Sec. 30.742-2(e) as added by T. D. 5242, is and was unconstitutional, illegal and void as herein

sought to be applied by the Commissioner, being beyond the authorization of Congress, being unfair and prejudicial by reason of the delay in its promulgation, and its requirements being without reason or meaning as applied to this petitioner.

5. The facts upon which petitioner relies as a basis for its proceeding are as follows:

(a) Petitioner was organized March 13, 1940 under the laws of the Territory of Hawaii, the business and substantially all of the assets of a partnership being transferred to it in exchange for its stock on April 1, 1940, in an exchange within the ambit of section 112(b)(5) I.R.C.

(b) This partnership had existed since January 1, 1937, with the only changes in its organization being minor ones made immediately prior to the aforesaid exchange and as a step in its consummation.

(c) All excess profits tax returns filed by the petitioner have claimed the benefits of Supplement A, and have computed an excess profits credit largely determined by the base period earnings of its predecessor partnerships.

(d) As late as June 6, 1944, in the audit of said returns, the Commissioner's representatives treated petitioner as entitled to the benefits of Supplement A, and he is now estopped to contend that petitioner did not make an effective election to be so treated for its excess profits tax years ended in 1940, 1941 and 1942 under the provisions of Section 228 of the Revenue Act of 1942 and Sec. 30.742-2(e), Regulations 109, as added by T. D. 5242, March 11, 1943.

(e) Petitioner's excess profits net income for its years ended November 30 up through 1945 was as follows:

1940.....	\$ 1,718.07	1943.....	\$32,119.36
1941.....	\$ 6,866.08	1944.....	\$22,460.03
1942.....	\$12,453.77	1945.....	\$ 8,060.45

(f) Petitioner's excess profits credit, computed on the income method without the benefit of carry-backs and carryforwards, as applicable to said taxable years is not less than as follows:

1940.....	\$21,694.14	1943.....	\$25,279.04
1941.....	\$21,694.14	1944.....	\$25,279.04
1942.....	\$25,279.04	1945.....	\$25,279.04

(g) Petitioner's predecessor had base period net income as determined by the Tax Court in its memorandum findings of fact and opinion dated May 29, 1947, and as follows:

	Calendar Years			3 months
	1937	1938	1939	1940
Net Income	\$49,887.19	\$35,062.57	\$29,706.50	\$27,658.54
Partner's "Salaries"	8,015.00	9,300.00	11,000.00	.....
	<hr/>	<hr/>	<hr/>	<hr/>
Balance	\$41,872.19	\$25,762.57	\$18,706.50	\$27,658.54
Dividends included	15.92	35.77	40.90	14.23

(h) Petitioner is informed and believes and therefore alleges the fact to be that it is entitled to the use of an excess profits credit for all of its excess profits tax years computed under the provisions of "Supplement A" and particularly, that it made an effective election to have the amendments of the Revenue Act of 1942 apply retroactively.

(i) Petitioner is informed and believes and therefore alleges the fact to be that it is entitled to an excess profits credit carry forward to its year ended in 1943 of not less than \$14,828.06 from its year ended in 1941 and not less than \$12,825.27 from its year ended in 1942.

(j) Petitioner is informed and believes and therefore alleges the fact to be that it is entitled to an excess profits credit carryback from its year ended in 1945 of not less than \$17,218.59 and from its year ended in 1944 of not less than \$2,819.01.

Wherefore, petitioner prays the Court to hear the proceeding, to determine that petitioner has no deficiency in excess profits taxes, grant such other relief as proper.

Respectfully submitted,

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

Counsel for Petitioner.

State of California,

City and County of San Francisco—ss.

Ben Fitch being first duly sworn, deposes and says:

That he is the president of Hawaiian Freight Forwarders, Ltd., a corporation, petitioner above named, and as such is authorized to make and makes this verification on behalf of said petitioner; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be

upon information and belief, and that those he believes to be true.

/s/ BEN FITCH

Subscribed and sworn to before me this 8th day of June, 1948.

[Seal] /s/ ALFRED I. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT "A"

Form 1233

SN-IT-4

Treasury Department
Internal Revenue Service
P.O. Box 421, Honolulu 9, Hawaii

Office of Internal Revenue Agent in Charge
Honolulu Division, 500 Alexander Young Bldg.

In replying refer to IT:FC:GSS-150D Feb. 2, 1948

Sirs:

You are advised that the determination of your income tax liability for the taxable years ended November 30, 1942, November 30, 1943 and November 30, 1944 discloses an overassessment of \$11,454.34, and that the determination of your declared value excess profits tax liability for the taxable year ended November 30, 1943 discloses a deficiency of \$20.63, and that the determination of your excess profits tax liability for the taxable years ended November 30, 1942, November 30, 1943 and November 30, 1944 dis-

Exhibit "A"—(Continued)

closes a deficiency of \$31,531.69, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 150 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 150th day) from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C. for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form of waiver and acceptance and forward it to the Internal Revenue Agent in Charge, P.O. Box 421, Honolulu, 9, T. H., for the attention of IT:FC:GSS. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GEO. J. SCHOENEMAN,
Commissioner

By H. A. PETERSON,
Internal Revenue Agent in
Charge.

Enclosures: Statement, Form of waiver and acceptance, Forms 843(3), Form 1276.

Exhibit "A"—(Continued)

STATEMENT

IT:FC:GSS

Hawaiian Freight Forwarders, Limited
P.O. Box 3113, Honolulu, T. H.

Tax Liability for the Taxable Years Ended November 30, 1942,
November 30, 1943, and November 30, 1944

Year	Liability	Assessed Income Tax	Overassessment	Deficiency
11-30-42	\$ 2,305.74	\$ 3,050.60	\$ 744.86	
11-30-43	2,144.97	10,451.69	8,306.72	
11-30-44	3,610.81	6,013.57	2,402.76	
Totals	\$ 8,061.52	\$19,515.86	\$11,454.34	

Declared Value Excess Profits Tax

Year	Liability	Assessed	Overassessment	Deficiency
11-30-43	\$ 1,557.90	\$ 1,537.36		\$ 20.63

Excess Profits Tax

Year	Liability	Assessed	Overassessment	Deficiency
11-30-42	\$ 2,703.76	None		\$ 2,703.76
11-30-43	21,424.70	None		21,424.70
11-30-44	7,403.23	None		7,403.23
Totals	\$31,531.69	None		\$31,531.69

In making this determination of your income tax, declared value excess profits tax and excess profits tax liability, careful consideration has been given to the original and supplemental reports of examination dated February 7, 1945, and November 6, 1945, respectively, covering the taxable year ended November 30, 1942, to the report of examination dated April 11, 1946 covering the taxable year ended November 30, 1943 and to the report of examination dated January 9, 1948 covering the taxable year ended November 30, 1944.

The overassessment in income tax shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limita-

Exhibit "A"—(Continued)

tions with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, claims for refund on Forms 843, three copies of which are enclosed, the basis of which may be set forth herein.

Taxable Year Ended November 30, 1943

Adjustments to Net Income

Net income as disclosed by return.....	\$12,687.29
Unallowable deductions and additional income:	
(a) Capital stock tax.....	81.25
	<hr/>
Net income adjusted.....	\$12,768.54

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for capital stock tax year ended June 30, 1943.

Computation of Tax

Net income adjusted.....	\$12,768.54
Less: 10% of \$400,000.00 as declared in your capital stock tax return for year ended June 30, 1942	\$40,000.00
85% of dividends received, \$1.25.....	1.06 40,001.06
	<hr/>
Net income subject to declared value excess profits tax.....	None

Computation for normal tax and surtax for taxable years ended on or after June 30, 1942:

Computation under 1941 Law—Tentative Tax

Net income for declared value excess profits tax.....	\$12,768.54
Less: Declared value excess profits tax.....	
	<hr/>
Net income for capital stock tax purposes.....	\$12,768.54
Less: Excess profits tax under 1941 law.....	\$1,630.04
Dividends received credit	1.06 1,631.10
	<hr/>
Balance subject to normal tax and surtax.....	\$11,137.44

Exhibit "A"—(Continued)

Computation under 1941 Law—Tentative Tax—(Continued)

Normal tax at 15% on \$5,000.00.....	750.00
Normal tax at 17% on \$6,137.44.....	1,043.36
<hr/>	
Total normal tax.....	\$ 1,793.36
Surtax at 6% on \$11,137.44.....	668.25
<hr/>	
Total tentative normal tax and surtax at 1941 rates.....	\$ 2,461.61

Computation under 1942 Law—Tentative Tax

Net income above	\$12,768.54
Less: Income subject to excess profits tax.....	\$4,657.27
Dividends received credit.....	1.06 4,658.33
<hr/>	
Balance subject to normal tax and surtax.....	\$ 8,110.21
<hr/>	
Normal tax at 15% on \$5,000.00.....	750.00
Normal tax at 17% on \$3,110.21.....	528.74
<hr/>	
Total normal tax.....	\$ 1,278.74
Surtax at 10% on \$8,110.21.....	811.02
<hr/>	
Total tentative normal tax and surtax at 1942 rates.....	\$ 2,089.76

Conversion of Tentative Tax to Actual Tax

Total tentative tax computed at 1941 rates.....	\$2,461.61
Number of days prior to July 1, 1942 212	
Prorated tax 212/365 of \$2,461.61.....	\$ 1,429.76
Total tentative tax computed at 1942 rates.....	\$2,089.76
Number of days after June 30, 1942	
in taxable year 153	
Prorated tax—153/365 of \$2,089.76.....	875.98
<hr/>	
Total income tax liability for taxable	
year ended November 30, 1942.....	\$ 2,305.74
Income tax disclosed by return—	
Account No. Jan. 410007.....	3,030.54
Additional assessed on March 16, 1945.....	20.06 3,050.60
<hr/>	
Overassessment in income tax.....	\$ 744.86
<hr/>	
Excess profits net income as disclosed by return.....	\$12,372.52

Exhibit "A"—(Continued)

Conversion of Tentative Tax to Actual Tax—(Continued)

Unallowable deductions and additional income:

(a) Capital stock tax.....	81.25
Excess profits net income adjusted.....	<u>\$12,453.77</u>

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for capital stock tax year ended June 30, 1943.

Computation of Excess Profits Credit on Invested
Capital Method

Money and property paid in for capital stock.....	\$30,000.00	
Accumulated earnings at November 30, 1941 per books....	4,239.90	
Organization expense charged off.....	350.00	
Capital stock tax overaccrued.....	458.00	
Deficiency in income tax for November 30, 1941.....	(75.57)	
Equity invested capital	<u>\$34,972.33</u>	
Reduction on account of inadmissible assets:		
Total inadmissible assets per supplemental re- port dated November 6, 1945.....	\$39.75	
Percentage of inadmissible assets to total assets per supplemental report dated November 6, 1945—.045869		
Reduction on account of inadmissible assets .045869 x \$34,972.33		16.04
Invested capital	<u>\$34,956.29</u>	
Excess profits credit—8% of \$34,956.29.....	\$ 2,796.50	
Excess Profits Tax Computation for Taxable Years Beginning in 1941 and Ending After June 30, 1942		
Excess profits net income adjusted.....	\$12,453.77	
Less: Specific exemption	\$5,000.00	
Excess profits credit.....	2,796.50	7,796.50
Adjusted excess profits net income.....		<u>\$ 4,657.27</u>

Exhibit "A"—(Continued)

Excess Profits Tax Computation for Taxable Years Beginning in
1941 and Ending After June 30, 1942—(Continued)

Excess profits tax computed under Section 710(a) (3) (A) :

Excess profits tax on \$4,657.27 at 35%—Tentative Tax.... 1,630.04

Excess profits tax computed under Section 710(a) (3) (B) :

Excess profits tax on \$4,657.27 at 90%—Tentative tax.... 4,191.54

Total excess profits tax:

Portion of tentative tax computed under section 710(a)

(3) (A) applicable to number of days before July 1,
1942—212/365 x \$1,630.04.....\$ 946.76

Portion of tentative tax computed under section 710(a)

(3) (B) applicable to number of days after June 30,
1942—153/365 x \$4,191.54..... 1,757.00

Excess profits tax liability.....\$ 2,703.76

Excess profits tax disclosed by return,

Account No. Jan. 800003

Deficiency in excess profits tax.....\$ 2,703.76

Taxable Year Ended November 30, 1943

Adjustments to Net Income

Net Income as disclosed by return.....\$33,524.85

Unallowable deductions and additional income:

(a) Capital stock tax..... 156.25

Net income adjusted.....\$33,681.10

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for
capital stock tax year ended June 30, 1944.

Computation of Tax

Net income adjusted.....\$33,681.10

Less: 10% of \$175,000 as declared in your
capital stock tax return for year ended

June 30, 1943.....\$17,500.00

85% of dividends received, \$3.75..... 3.18 17,503.18

Net income subject to declared value excess profits tax....\$16,177.92

Exhibit "A"—(Continued)
Computation of Tax—(Continued)

5% of declared value of capital stock—\$175,000.00—		
\$8,750.00 at 6.6%	\$	577.50
Balance \$7,427.92 at 13.2%		980.49
		<hr/>
Total declared value excess profits tax.....	\$	1,557.99
Declared value excess profits tax disclosed by return—		
Account No. Feb. 410000		1,537.36
		<hr/>
Deficiency in declared value excess profits tax.....	\$	20.63
		<hr/>
Net income for declared value excess profits tax.....	\$33,681.10	
Less: Declared value excess profits tax.....	1,557.99	
		<hr/>
Adjusted net income.....	\$32,123.11	
Less: Income subject to excess profits tax...\$23,805.22		
Dividends received credit.....	3.18	23,808.40
		<hr/>
Normal tax and surtax net income.....	\$	8,314.71
		<hr/>
Normal tax at 15% on \$5,000.00.....	\$	750.00
Normal tax at 17% on \$3,314.71.....		563.50
		<hr/>
Total normal tax.....	\$	1,313.50
Surtax at 10% on \$8,314.71.....		831.47
		<hr/>
Total income tax liability.....	\$	2,144.97
Income tax liability disclosed by return		
Account No. Feb. 410000.....		10,451.69
		<hr/>
Overassessment in income tax.....	\$	8,306.72
		<hr/>
Excess profits net income as disclosed by return.....	\$31,983.74	
Unallowable deductions and additional income:		
(a) Capital stock tax		156.25
		<hr/>
Total	\$32,139.99	

Exhibit "A"—(Continued)

Computation of Tax—(Continued)

Nontaxable income and additional deductions:

(b) Deficiency in declared value excess profits tax..... 20.63

Excess profits net income adjusted.....\$32,119.36

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for capital stock tax year ended June 30, 1944.

(b) Deficiency in declared value excess profits tax for the taxable year ended November 30, 1943, per this report.

Computation of Excess Profits Credit on Invested
Capital Method

Money and property paid in for capital stock.....	\$30,000.00
Accumulated earnings at November 30, 1942 per books....	13,071.16
Organization expense charged off.....	350.00
Capital stock tax overaccrued	81.25
Deficiency in income tax for November 30, 1941.....	(75.57)
Deficiency in income tax for November 30, 1942.....	(20.06)
Overassessment in income tax for November 30, 1942.....	744.86
Deficiency in excess profits tax for November 30, 1942....	(2,703.76)

Equity invested capital\$41,447.88

Reduction on account of inadmissible assets:

Total inadmissible assets per report dated April

11, 1946\$39.75

Percentage of inadmissible assets to total assets

per report dated April 11, 1946—.051

Reduction on account of inadmissible assets—

.051 x \$41,447.88 21.14

Invested capital\$41,426.74

Excess profits credit—8% of \$41,426.74.....\$ 3,314.14

Computation of Excess Profits Tax

Excess profits net income adjusted.....\$32,119.36

Less: Specific exemption\$5,000.00

Excess profits credit 3,314.14 8,314.14

Exhibit "A"—(Continued)

Computation of Excess Profits Tax—(Continued)

Adjusted excess profits net income.....	\$23,805.22
90% of \$23,805.22	\$21,424.70
Surtax net income	\$32,119.36
80% of \$32,119.36	\$25,695.49
Income tax	2,144.97
Excess	\$23,550.52
Excess profits tax liability.....	\$21,424.70
Excess profits tax disclosed by return— Acct. No. Jan.NC 800002	
Deficiency in excess profits tax.....	\$21,424.70

Taxable Year Ended November 30, 1944

Adjustments to Net Income

Net income as disclosed by return.....	\$22,463.78
Net income adjusted—no changes.....	\$22,463.78

Computation of Tax

Net income adjusted.....	\$22,463.78
Less: 10% of \$250,000.00 as declared in your capital stock tax return for year ended June 30, 1944	\$25,000.00
85% of dividends received, \$3.75.....	3.18 25,003.18
Net income subject to declared value excess profits tax....	None

Exhibit "A"—(Continued)

Computation for normal tax and surtax for taxable years beginning in 1943 and ending in 1944:

Computation under 1943 Law—Tentative Tax

Net income for declared value excess profits tax.....	\$22,463.78	
Less: Declared value excess profits tax.....		
Net income	\$22,463.78	
Less: Adjusted excess profits tax income.....	\$13,293.34	
Dividends received credit	3.18	13,296.52
Normal tax net income and surtax net income.....	\$ 9,167.26	
Normal tax at 15% on \$5,000.00.....	\$ 750.00	
Normal tax at 17% on \$4,167.26.....		708.43
Total normal tax	\$ 1,458.43	
Surtax at 10% on \$9,167.26.....		916.73
Total tentative normal tax and surtax at 1943 rates.....	\$ 2,375.16	

Computation under 1944 Law—Tentative Tax

Net income above	\$22,463.78	
Less: Adjusted excess profits net income.....	\$8,293.34	
Dividends received credit.....	3.18	8,296.52
Normal tax net income and surtax net income.....	\$14,167.26	
Normal tax at 15% on \$5,000.00.....	\$ 750.00	
Normal tax at 17% on \$9,167.26		1,558.43
Total normal tax	\$ 2,308.43	
Surtax at 10% on \$14,167.26		1,416.73
Total tentative normal tax and surtax at 1944 rates.....	\$ 3,725.16	

Conversion of Tentative Tax to Actual Tax

Total tentative tax computed at 1943 rates.....	\$2,375.16	
Number of days in 1943—31		
Prorated tax—31/366 of \$2,375.16.....		\$ 201.17

Exhibit "A"—(Continued)
Computation of Tax—(Continued)

Total tentative tax computed at 1944 rates.....	3,725.16	
Number of days in 1944—335		
Prorated tax—335/366 of \$3,725.16.....		\$ 3,409.64
<hr/>		
Total income tax liability for taxable year ended		
November 30, 1944		\$ 3,610.81
Income tax liability disclosed by return		
Acct. No. Feb. 410007		6,013.57
<hr/>		
Overassessment in income tax.....		\$ 2,402.76
<hr/>		
Excess profits net income as disclosed by return.....		\$22,460.03
<hr/>		
Excess profits net income adjusted—no change.....		\$22,460.03
<hr/>		

Computation of Excess Profits Credit on Invested

Capital Method

Money and property paid in for capital stock.....	\$30,000.00
Accumulated earnings at Nov. 30, 1943, per books.....	34,550.81
Organization expense charged off.....	350.00
Capital stock tax overaccrued	156.25
Deficiency in income tax for Nov. 30, 1941.....	(75.57)
Deficiency in income tax for Nov. 30, 1942.....	(20.06)
Overassessment in income tax for Nov. 30, 1942.....	744.86
Deficiency in excess profits tax for Nov. 30, 1942.....	(2,703.76)
Deficiency in declared value excess profits tax for	
Nov. 30, 1943	(20.63)
Overassessment in income tax for Nov. 30, 1943.....	8,306.72
Deficiency in excess profits tax for Nov. 30, 1943.....	(21,424.70)
Post war refund of excess profits tax.....	2,318.17
<hr/>	
Equity invested capital.....	\$52,182.09
Reduction on account of inadmissible assets:	
Total inadmissible assets per report dated	
Jan. 9, 1948	\$187.55
Percentage of inadmissible assets to total	
assets per report dated Jan. 9, 1948—.1887	
Reduction on account of inadmissible assets	
.1887 x \$52,182.09	98.47
<hr/>	

Exhibit "A"—(Continued)
 Computation of Excess Profits Credit on Invested
 Capital Methods—(Continued)

Invested capital	\$52,083.62
Excess profits credit—8% of \$52,083.62.....	\$ 4,166.69

Excess Profits Tax Computation for Taxable Years Beginning
 in 1943 and Ending in 1944

Computation at 1943 rates:	
Excess profits net income adjusted.....	\$22,460.03
Less: Specific exemption	\$5,000.00
Excess profits credit.....	4,166.69 9,166.69
Adjusted excess profits net income.....	\$13,293.34

Excess profits tax computed under Section 710(a) (6) (A) :	
Excess profits tax on \$13,293.34 at 90%—Tentative tax....	\$11,964.01

Computation at 1944 rates:	
Excess profits net income adjusted.....	\$22,460.03
Less: Specific exemption	\$10,000.00
Excess profits credit	4,166.69 14,166.69
Adjusted excess profits net income.....	\$ 8,293.34

Excess profits tax computed under Section 710(a) (6) (B) :	
Excess profits tax on \$8,293.34 at 95%—Tentative tax.....	\$ 7,878.67

Total excess profits tax:	
Portion of tentative tax computed under section 710(a)	
(6) (A) applicable to number of days in 1943—	
31/366 x \$11,964.01	\$ 1,013.35
Portion of tentative tax computed under section 710(a)	
(6) (B) applicable to number of days in 1944—	
335/366 x \$7,878.67.....	7,211.35
Total excess profits tax	\$ 8,224.70

Exhibit "A"—(Continued)

Excess Profits Tax Computation for Taxable Years Beginning
in 1943 and Ending in 1944—(Continued)

Surtax net income	\$22,460.60
80% of \$22,460.00	\$17,968.48
Income tax	3,610.81
Excess	\$14,357.67
Total excess profits tax.....	\$ 8,224.70
Less: 10% credit	822.47
Excess profits tax liability.....	\$ 7,403.23
Excess profits tax disclosed by return— Acct. No. Feb. 940000.....	.....
Deficiency in excess profits tax.....	\$ 7,403.23

Received and Filed T.C.U.S. June 14, 1948.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is excess profits tax for the taxable years ended November 30, 1943 and November 30, 1944; denies the remain-

ing allegations contained in paragraph 3 of the petition.

4. (a), (b), (c), (d). Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in subparagraphs (a), (b), (c) and (d) of paragraph 4 of the petition.

5. (a). Denies the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b), (c). For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (b) and (c) of paragraph 5 of the petition.

(d) to (j), inclusive. Denies the allegations contained in subparagraphs (d) to (j), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT, WTF,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
T. M. MATHER,
W. J. McFARLAND,
Special Attorneys,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. July 27, 1948.

[Title of Tax Court and Cause.]

REQUEST FOR DESIGNATION OF
PLACE OF HEARING

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and in accordance with Rule 26 of the Court's Rules of Practice.

Request that the Court designate that the hearing in the above-entitled proceeding be held at San Francisco, California, or vicinity, in order to afford the respective parties an opportunity to produce evidence at the trial with a minimum expense.

/s/ CHARLES OLIPHANT, WTF,
Chief Counsel, Bureau of
Internal Revenue

Of Counsel:

B. H. NEBLETT,
T. M. MATHER,
W. J. McFARLAND,
Special Attorneys,
Bureau of Internal Revenue

Received and Filed T.C.U.S. July 27, 1948.

[Title of Tax Court and Cause.]

NOTICE OF PLACE OF HEARING

Notice is hereby given that the above entitled proceeding has been placed upon the San Francisco, Calif., calendar of the Court for hearing on the

merits in due course either in the city named or in the vicinity thereof.

This notice refers only to the place of hearing and not to the time. The parties will be notified in due course of the exact time and place of hearing on the merits.

If either party desires that the hearing on the merits be held at some place other than the place above named, he must so notify the Court within 30 days from the date of this notice, and name the place he prefers. The Court will consider any request filed as above provided, and if it decides that the place of hearing should be changed, it will so notify the parties.

Service of answer and request is hereby made.

Dated: August 5, 1948.

/s/ VICTOR S. MERSCH,
Clerk.

To: Louis Janin, Esq., 1104 Mills Tower, San Francisco 4, Calif.

[Title of Tax Court and Cause.]

NOTICE OF SETTING PROCEEDING FOR
HEARING—CIRCUIT CALENDER

Take Notice that a Division of The Tax Court of the United States will sit in Custom House Courtroom No. 421, Appraisers Bldg., San Francisco, Calif., beginning May 9, 1949.

Hearings will be held in all proceedings shown on

the attached list. The list will be called promptly at 10:00 a.m., as indicated, and you will be expected to answer the call at that time and be prepared for trial when reached. No continuance will be granted except for extraordinary cause. Failure to appear will be taken for cause for dismissal in accordance with the Rules of Practice, and you are in all other respects expected to be familiar with such rules.

Dated: March 11, 1949.

Respectfully,

/s/ VICTOR S. MERSCH,
Clerk.

To: Louis Janin, Esq., 1104 Mills Tower, San Francisco 4, Calif.

[Title of Tax Court and Cause.]

APPLICATION FOR SUBPOENA

Duces Tecum

To the Tax Court of the United States:

Application is hereby made for the issuance of a subpoena for the attendance before a Division of The Tax Court of the United States, Customs Courtroom, Room 421, U. S. Appraisers Bldg., 630 Sansome Street, at San Francisco, California, on May 9, 1949, at 10:00 o'clock a.m. or any further hearing of the above-named proceeding, of the following persons whose oral testimony is desired on behalf of the respondent in the above-entitled proceeding:

Name: Hawaiian Freight Forwarders, Ltd., by Ben Fitch, President, or any duly authorized officer or employee who is able to identify the documents called for below.

Address: 420 Market Street, San Francisco, California.

The above party is required to bring the following:

(1) All balance sheets and profit and loss statements per books of Hawaiian Freight Association, Ltd., for the year 1936; (2) All balance sheets, profit and loss statements and capital and withdrawal accounts per books of the partnership known as Hawaiian Freight Association for the years 1937 to 1940, inclusive; (3) All balance sheets and profit and loss statements per books of Hawaiian Freight Forwarders, Ltd., for the years 1940 to 1942, inclusive.

The issues involved in this cause are of such a nature as to make it essential to have available at the trial of this proceeding, the records listed above, in order to properly present the respondent's position.

Dated: March 24, 1949.

/s/ CHARLES OLIPHANT, GM,
Chief Counsel,
Bureau of Internal Revenue

Filed T.C.U.S. March 29, 1949.

[Title of Tax Court and Cause.]

SUBPOENA—DUCES TECUM

The President of the United States of America to
Hawaiian Freight Forwarders, Ltd., 420 Mar-
ket Street, San Francisco, Calif., by Ben Fitch,
President, or any duly authorized officer or em-
ployee who is able to identify the documents
called for below, Greeting:

You Are Hereby Commanded under penalty of
law to be and appear in your proper person before
a Division of The Tax Court of the United States,
Customs Courtroom, Room 421, U. S. Appraisers
Building, 630 Sansome Street, at San Francisco,
California, on the 9th day of May, 1949, at 10:00
o'clock a.m., or any further hearing of the above-
named proceeding, then and there to testify on be-
half of the respondent in the matter of the tax lia-
bility of the above-named petitioner, now pending
before The Tax Court of the United States.

You are required to bring with you the following,
to wit: (1) All balance sheets and profit and loss
statements per books of Hawaiian Freight Associa-
tion, Ltd., for the year 1936;

(2) All balance sheets, profit and loss statements
and capital and withdrawal accounts per books of the
partnership known as Hawaiian Freight Association
for the years 1937 to 1940, inclusive;

(3) All balance sheets and profit and loss state-

ments per books of Hawaiian Freight Forwarders, Ltd., for the years 1940 to 1942, inclusive.

By order of the Court this day of March 29, 1949.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Delivered 3/29/49.

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: May 13, 1949. Place: San Francisco, Calif.

Docket No. 19283.

Proceeding: Hawaiian Freight Forwarders, Ltd.

Assigned to: Judge Van Fossan, Division No. 9.

Counsel: For Petitioner: Louis Janin, Esq., 1104 Mills Tower, San Francisco, Calif; For Respondent: W. J. McFarland, Esq.

Stenographic Reporter: Cotton.

Hearing: 2:45 p.m., 3:10 p.m. Sub.

Transcript Ordered: Yes.

On the merits: Yes.

Filed at hearing: Stipulation of Facts with Exhibits 2-B attached.

Petitioner's brief: 45 days—June 27, 1949. Respondent's brief: 45 days—June 27, 1949. Replies 20 days—July 18, 1949.

Exhibits: Petitioner's: 3. Certified copy of Statement of Co-Partnership; 4. Certified copy of Statement of Dissolution; 5. Certificate of Treasurer, Hawaii; 6. Report of Tennant & Greaney; 7. Report dated 6/2/44; 8. Report dated 2/19/45.

Exhibits: Respondent's: C. 1936 Partnership Tax

Return; D. Final Partnership Ret. of Income for 1940; E. Partnership Return of Income 1940; F. 1940 Tax Return (Form 1120); G. 1940 Tax Return (Form 1121); H. 1941 Tax Return (Form 1120); I. 1941 Tax Return (Form 1121) J. 1942 Tax Return (Form 1120); K. 1942 Tax Return (Form 1121); L. 1943 Tax Return (Form 1120); M. 1943 Tax Return (Form 1121); N. 1944 Tax Return (Form 1120); O. 1944 Tax Return (Form 1121); P. 1945 Tax Return (Form 1120); Q. 1945 Tax Return (Form 1121).

/s/ MARY Y. ROBERTS,
Acting Deputy Clerk.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Agreed by the parties to the above entitled proceeding, acting through their respective counsel, that the statements hereinafter set forth are true, reserving to each of said parties and their respective counsel the right to introduce other evidence not inconsistent with such statements:

1. Hawaiian Freight Association, Ltd., was organized as a corporation under the laws of the Territory of Hawaii on March 16, 1933, to engage in the freight forwarding business; it was liquidated and dissolved on or about December 31, 1936 and its assets distributed to its then shareholders who were

J. C. Leffel, owning	33 shares
G. C. Ballentyne, owning	24 shares
A. G. Schnack, owning	10 shares

2. On or about January 2, 1937, the said shareholders of Hawaiian Freight Association, Ltd., created a partnership, Hawaiian Freight Association, and to it transferred the assets and business theretofore owned and operated by Hawaiian Freight Association, Ltd. The interests of the partners were in the same proportions as their shareholdings in the predecessor corporation and so remained until March 8, 1940.

3. Prior to March 8, 1940, an understanding had been reached between J. C. Leffel and G. C. Ballentyne and Oahu Railway and Land Company that a corporation would be formed to take over and operate the assets and business of Hawaiian Freight Association, with Leffel, Ballentyne and Oahu as equal shareholders. It was believed that this would be to the mutual advantage of the parties concerned.

4. On March 8, 1940, an agreement was entered into by and between Schnack, Leffel and Ballentyne with respect to Schnack's interest in Hawaiian Freight Association, a true copy of which agreement marked Exhibit A-1 is attached hereto and by this reference made a part hereof. The payment of the \$8,000 referred to therein was by check of the partnership drawn March 8, 1940. After the withdrawal of A. G. Schnack, Ballentyne and Leffel were equal partners in the business conducted by Hawaiian Freight Association.

5. The petitioner corporation was organized under the laws of the Territory of Hawaii on March 13 or 14, 1940, with a capital of \$120,000 represented by 6,000 shares, issued 2,999 to Leffel and 2,998 to

Ballentyne, 3 qualifying shares being nominally issued to others. For these shares the petitioner received the business and the following assets formerly owned by Hawaiian Freight Association:

Cash	\$19,237.07
Receivables	9,151.08
Furniture and Fixtures.....	1,341.86
Stationery and Supplies.....	269.99
Goodwill	90,000.00
	<hr/>
	\$120,000.00

The change of operations to corporate form was fully effected by April 1, 1940. The great bulk of the business was between Chicago and Honolulu, and the time required from the initiation of business to delivery and collection of charges was normally three weeks. The transfer of the assets listed above was completed on April 1, 1940. Attached hereto and marked Exhibit B-2 is a true and correct copy of the minutes of the adjourned meeting of the shareholders of petitioner held on March 19, 1940.

6. The first excess profits tax return filed for the petitioner was that for its fiscal year ended November 30, 1941, filed on or about February 15, 1942. Its excess profits tax return for the fiscal year ended November 30, 1940, was filed June 15, 1942. The excess profits tax returns for the fiscal years subsequent to that ended November 30, 1941, to and including that for the year ended November 30, 1945, were filed on or about the due date thereof. All of such returns claimed a credit on the average earnings method, utilizing as one of the factors the earnings of Hawaiian Freight Association.

7. The following schedule reflects net income before Federal taxes upon which petitioner's excess profits credit may be computed under Rule 50 in the event it is determined by the Court that petitioner is entitled to the provisions of Supplement A as provided by Sections 740 to 744, inclusive, of the Internal Revenue Code:

Year Ended 12/31/37.....	\$28,648.27
12/31/38.....	18,185.82
12/31/39.....	14,352.05
Three months ended 3/31/40.....	18,089.59

8. The excess profits net income of the petitioner for its taxable years 1940 to 1945, inclusive, is as follows:

Year	Net Income
1940	\$ 1,718.07
1941	6,866.08
1942	* 12,453.77
1943	32,119.36
1944	22,460.03
1945	8,060.45

9. The capital and accumulated earnings as shown by the books of the partnership known as Hawaiian Freight Association were as follows:

	1937	1938	1939	3 months 1940
Capital at beginning of year	\$16,984.12	\$16,984.12	\$16,984.12	\$16,984.12
Accumulated earnings, Jan. 1	.....	19,208.21	14,138.70	16,943.74
Totals, Jan. 1	\$16,984.12	\$36,192.36	\$31,122.82	\$33,927.86

10. The individual accounts of the partners as shown by said books and the audit reports of Ten-

nant and Greaney, C.P.A.s, for the calendar years 1937 to 1939, inclusive, were as follows:

	J. C. Leffel	G. C. Ballentyne	A. G. Schnack
Capital, %	49.26	35.82	14.92
Capital, Jan. 1, 1937.....	\$ 8,366.42	\$ 6,083.67	\$ 2,534.03
Salary	4,200.00	3,815.00	.....
Profit	20,547.83	14,941.60	6,223.58
Totals.....	\$33,114.25	\$24,840.27	\$ 8,757.61
Drawings	15,247.29	11,926.48	3,346.03
Balance Dec. 31, 1937.....	\$17,866.96	\$12,913.79	\$ 5,411.58
1937 profits drawn 1938.....	9,500.54	6,830.12	2,877.55
Capital, Jan. 1, 1938.....	\$ 8,366.42	\$ 6,083.67	\$ 2,534.03
Salary	4,650.00	4,650.00	.....
Profit	12,588.77	9,132.26	3,803.83
Totals.....	\$25,575.19	\$19,865.93	\$ 6,337.86
Drawings	10,657.99	8,998.60	1,000.00
Balance Dec. 31, 1938.....	\$14,917.20	\$10,867.33	\$ 5,337.86
1938 profits drawn 1939.....	6,550.78	4,783.66	2,803.83
Capital, Jan. 1, 1939.....	\$ 8,366.42	\$ 6,083.67	\$ 2,534.03
Salaries	5,500.00	5,500.00	.....
Profit	9,121.37	6,632.71	2,762.71
Totals.....	\$22,987.79	\$18,216.38	\$ 5,296.74
Drawings	5,742.98	6,830.07	.....
Balance Dec. 31, 1939.....	\$17,244.81	\$11,386.31	\$ 5,296.74

11. The net income of the partnership, Hawaiian Freight Association, for the period January 1, 1940-March 31, 1940, was in the amount of \$27,662.94, its final return for 1940 disclosing a net income of \$27,658.54 which includes a long term net capital loss of \$4.40 sustained April 5, 1940.

12. Approximately \$30,000.00 of capital was required by the petitioner for its operations.

13. That portion of the foregoing stipulation which deals with the earnings of the Hawaiian Freight Association for the three months ended March 31, 1940, shall not be regarded as a concession on the part of the respondent that only one partnership was in existence during the said period, it being the respondent's position that the elimination of A. G. Schnack as a partner on March 8, 1940 terminated the existing partnership and resulted in the creation of a new partnership on that date. It is agreed that if the respondent's position in this respect is sustained, the earnings for said three-months' period can be prorated on a daily basis.

Witness our hands this 2nd day of May, 1939.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT, GM,
Chief Counsel,
Bureau of Internal Revenue
Counsel for Respondent

EXHIBIT A-1

This Agreement, made and entered into this 8th day of March, 1940, by and between A. G. Schnack, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the Party of the First Part, and J. C. Leffel, of Chicago, Illinois, and

Exhibit A-1—(Continued)

G. C. Ballentyne, of Honolulu aforesaid, hereinafter called the Parties of the Second Part,

Witnesseth That

Whereas, the Party of the First Part and the Parties of the Second Part are co-partners doing business under the firm name and style of Hawaiian Freight Association," and

Whereas, said Party of the First Part is desirous of withdrawing from said co-partnership and withdrawing from said co-partnership his entire share or interest in all of the property and assets of said co-partnership, and

Whereas for the period ending December 31, 1939, as shown by the audit of said co-partnership made by Tennent & Greaney, certified public accountants, the interest of said co-partnership amounts to the sum of Five Thousand Two Hundred Ninety-Six and 74/100ths Dollars (\$5,296.74), and

Whereas additional profits have been earned by said co-partnership for the period from December 31, 1939, to the date hereof, said profit together with the interest of said Party of the First Part in the good will and other assets of said co-partnership amounting to the agreed sum and value of Two Thousand Seven Hundred Three and 06/100ths Dollars (\$2,703.06), the total interest of said Party of the First Part to date totalling Eight Thousand Dollars (\$8,000.00),

Now, Therefore, in consideration of the distribu-

Exhibit A-1—(Continued)

tion by said co-partnership to said Party of the First Part of the sum of Eight Thousand Dollars (\$8,000), receipt whereof is hereby acknowledged by said Party of the First Part, the Party of the First Part, as of the date hereof, withdraws from said co-partnership and releases unto said Parties of the Second Part, as the remaining partners in said co-partnership, all of his, said Party of the First Part's interest in and to the remaining property and assets, tangible and intangible, of said co-partnership, including all investments, corporate stocks, prepaid freight, debts, claims, book accounts, choses in action, whether the same are now due and payable or hereafter become due and payable, all rights, privileges and powers of every kind, and in and unto the good will of said co-partnership;

And in consideration of the foregoing, said Parties of the Second Part assume and agree to pay all obligations of said co-partnership and to indemnify and save harmless said Party of the First Part from any loss, damage or liability by reason of his having been a member of said co-partnership.

In Witness Whereof the parties hereto have executed these presents the day and year first above written.

/s/ A. G. SCHNACK,

Party of the First Part

/s/ J. C. LEFFEL,

/s/ G. C. BALLENTYNE,

Parties of the Second Part.

Exhibit A-1—(Continued)

Territory of Hawaii,

City and County of Honolulu—ss.

On this 8th day of March, 1940, before me personally appeared A. G. Schnack, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[Seal]

JOHN EPPINGER,

Notary Public, First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,

City and County of Honolulu—ss.

On this 8th day of March, 1940, before me personally appeared J. C. Leffel and G. C. Ballentyne, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal]

JOHN EPPINGER,

Notary Public, First Judicial Circuit, Territory of
Hawaii.

EXHIBIT B-2

Minutes of Adjourned Meeting of the Stockholders
of Hawaiian Freight Forwarders, Ltd.

The adjourned meeting of the stockholders of
Hawaiian Freight Forwarders, Ltd, was held at the

Exhibit B-2—(Continued)

office of Smith, Wild, Beebe & Cades, Bishop Trust Building, Honolulu, Territory of Hawaii, on Tuesday, March 19, 1940, at 10 o'clock a.m., all incorporators and stockholders being present.

Capital Stock

Upon motion duly seconded, the officers of the corporation were authorized to issue to J. C. Leffel two thousand nine hundred ninety-nine (2,999) shares of capital stock of Hawaiian Freight Forwarders, Ltd., and to G. C. Ballentyne two thousand nine hundred ninety-eight (2,998) shares of the capital stock of said corporation, in consideration of the transfer by said J. C. Leffel and said G. C. Ballentyne of all of the property and assets of said Hawaiian Freight Association, a co-partnership, including the sum of \$30,000.00 cash, said J. C. Leffel and G. C. Ballentyne being the sole co-partners of said co-partnership, said transfer to be in the form as set forth in the affidavit of officers filed with the Treasurer of the Territory of Hawaii on March 14, 1940.

Election of Officers and Directors

Upon motion duly seconded, the persons named in the Articles of Association were elected officers and directors of the corporation as stated in the Articles of Association, to serve until the annual stockholders' meeting of the corporation in 1941, and thereafter until their successors are elected.

Corporate Seal

Upon motion duly seconded, Mr. G. C. Ballentyne authorized the Secretary to prepare a corporate seal

Exhibit B-2—(Continued)

in the form prescribed by the By-Laws which was duly adopted as the seal of the corporation.

Appointment of Auditor

Upon motion duly made and seconded, Tennant & Greaney certified public accountants, Dillingham Building, Honolulu, T. H., were appointed auditors of the corporation.

There being no further business to come before the meeting, the meeting was adjourned.

RICHARD W. WHITE,
Secretary.

Approved:

G. C. BALLENTYNE,
President

Filed T.C.U.S. May 13, 1949.

[Title of Tax Court and Cause.]

Miss Peters, Mrs. Roberts, Docket Clerk, Mr. Cypert:

The following entitled proceedings are hereby re-assigned from Judge Van Fossan (Division 9), to Judge Turner (Division 8).

Proceeding	Docket No.
Harold W. & Corinne E. Johnston	19928
The Prosperity Co., Inc.	17446
Est. of Geo. F. Thompson, Dec'd.	20114
Hawaiian Freight Forwarders, Ltd.	19283

Please change all records accordingly.

Dated: July 27, 1949.

/s/ JOHN W. KERN,
Presiding Judge.

[Title of Tax Court and Cause.]

15 T. C. No. 7

FINDING OF FACT AND OPINION

Promulgated July 31, 1950

A, B and C were partners in a freight forwarding business with interests approximating 49%, 35% and 15%, respectively. A and B reached an agreement with an outside party for the transfer of the business and its assets, exclusive of C's interest, to a newly organized corporation. An agreement was then reached with C for the payment to him of an amount which the parties had agreed represented his interest in the assets of the business, including good will and in the accumulated profits since the beginning of the year. Petitioner corporation was then formed and in exchange for its entire issue of 6,000 shares of stock acquired the business of the partnership including good will and up to \$30,000 of the other assets remaining after the above payment to C. The 6,000 shares of stock were received 2,999 by A, 2,998 by B and 3 by their nominees. Held, that petitioner was not an acquiring corporation of the said partnership within the meaning of section 740(a)(1)(D) of the Internal Revenue Code since

the exchange by A and B of their interests in the partnership for petitioner's stock was not an exchange to which section 112(b)(5) of the Internal Revenue Code was applicable.

Louis Janin, Esq., for the petitioner.

W. J. McFarland, Esq., for the respondent.

OPINION

Turner, Judge: The respondent determined deficiencies in excess profits tax against the petitioner for the fiscal years ended November 30, 1943, and November 30, 1944, in the amounts of \$21,424.70 and \$7,403.23. The question is whether or not the respondent erred in determining petitioner's excess profits credit on the basis of invested capital under section 714 of the Internal Revenue Code rather than upon the basis of income under section 713 of the Code. The answer to that question in turn depends upon the determination whether petitioner was or was not an acquiring corporation under the provisions of section 740(a)(1)(D) of the Code.

The facts have been stipulated and as stipulated are so found.

The petitioner is a corporation organized under the laws of the Territory of Hawaii on March 13 or 14, 1940. It filed its returns for the taxable years here in question with the Collector of Internal Revenue for the Territory of Hawaii.

It is the claim of petitioner that it acquired, in the

manner prescribed in section 740(a)(1)(D),¹ substantially all of the properties of Hawaiian Freight Association, a partnership. The partnership had previously succeeded to the business and assets of Hawaiian Freight Association, Ltd., an Hawaiian corporation which had been organized on March 6, 1933, to engage in the freight forwarding business. The corporation was liquidated and dissolved on or about December 31, 1936, at which time its 67 shares of outstanding stock were owned 33 by Leffel, 24 by Ballentyne and 10 by Schnack. Upon liquidation its business and assets were distributed to its shareholders who on January 2, 1937, two days later, organized the partnership, Hawaiian Freight Association, to which they transferred the freight forwarding business. Their partnership interests were in the same proportions as the corporate stock had been owned. This partnership operation continued through 1937, 1938, 1939, and into 1940.

At some time prior to March 8, 1940, an arrangement and understanding was reached whereby the business of Hawaiian Freight Association, the partnership, would be acquired by a new corporation to

¹ Sec. 740. Definitions.

(a) Acquiring Corporation.—The term “acquiring corporation” means—

(1) A corporation which has acquired—

* * * *

(D) substantially all the properties of a partnership in an exchange to which section 112(b)(5), or so much of section 112(c) or (e) as refers to section 112(b)(5), or to which a corresponding provision of a prior revenue law, is or was applicable.

be formed with Leffel, Ballentyne and Oahu Railway and Land Company as equal shareholders. Schnack was not included in the plans for the new corporation.

In steps taken to effectuate the above understanding an agreement was entered into on March 8, 1950, between Schnack on the one hand and Leffel and Ballentyne on the other, whereby it was agreed that Schnack would receive from the partnership, as his interest therein, the sum of \$8,000, and that he would release unto Leffel and Ballentyne any and all interest he might have in and to the remaining property and assets, tangible and intangible, including good will. Leffel and Ballentyne agreed to indemnify Schnack and save him harmless from any loss, damage or liability by reason of his having been a member of the partnership. The agreement disclosed that on the basis of an audit of the partnership's affairs for the period ending December 31, 1939, Schnack's interest in the assets and business was shown as \$5,296.74 and further that his share of profits for the period from December 31, 1939, to March 8, was \$2,703.06. It was agreed that \$8,000, the total in round figures of the two amounts stated, represented Schnack's interest in the good will and other assets of the partnership plus his share of the earnings after December 31, 1939.²

²The parties have stipulated that according to the books and as disclosed by the audit report of a firm of certified public accountants, the balances in the accounts of the partners as of December 31, 1939 were: Leffel \$17,244.81, Ballentyne \$11,386.31 and

The capital of the petitioner when organized was fixed at \$120,000 divided into 6,000 shares. After the above payment to Schnack, the petitioner in exchange for its 6,000 shares of stock received the going business of Hawaiian Freight Association and most, if not all, of its remaining assets. The assets so acquired are listed in the stipulation as follows:

Cash	\$ 19,237.07
Receivables	9,151.08
Furniture and Fixtures.....	1,341.86
Stationery and Supplies.....	269.99
Good Will	90,000.00 ³
	<hr/>
	\$120,000.00

The stock issued in exchange for the said properties was issued 2,999 shares to Leffel, 2998 to Ballentyne and 3 to others as their nominees.

The issuance of petitioner's six thousand shares

Schnack \$5,296.74. A breakdown of these amounts between the original contributions of partnership's capital and the balance of undrawn profits would show the following:

Leffel: Capital, \$8,366.42—49.26%; Undrawn Profits, \$8,878.39.

Ballentyne: Capital, \$6,083.67—35.82%; Undrawn Profits, \$5,302.64.

Schnack: Capital \$2,534.03 — 14.92%; Undrawn Profits, \$2762.71.

The stipulation also shows that the net income of the partnership for the period from January 1, 1940 to March 31, 1940 was \$27,662.94.

³ The stipulation gives no explanation of the wide margin of difference between the allowance therefor to Schnack under the March 8 agreement and the \$90,000 at which it was carried into petitioner's books.

of stock for the above assets of Hawaiian Freight Association was approved at an adjourned meeting of petitioner's stockholders held on March 19, 1940. It was not possible to make immediate transfer of all of the partnership assets which were to be received by petitioner for the reason that the great bulk of the freight forwarding business was between Honolulu and Chicago and it required approximately three weeks to complete all operations on all of the business which had already been initiated. All transfers had been made by April 1, 1940, and the change of operations to petitioner was fully effected by that date.

On July 2, 1940, a statement of dissolution of the Hawaiian Freight Association, dated June 26, 1940, was filed in the office of the Treasurer of the Territory of Hawaii. The statement of dissolution showed Leffel, Ballentyne and Schnack as the partners and recited that the partnership was dissolved on March 14, 1940. The said statement was executed by A. G. Schnack and G. C. Ballentyne.

Under section 740(a)(1)(D) a corporation is to be regarded as an acquiring corporation and as such is entitled to utilize the base period earnings of its predecessor in computing its excess profit credit if it has acquired "substantially all of the properties of a partnership in an exchange to which section 112(b)(5) * * * is or was applicable." By the applicable provisions of section 112(b)(5) it is provided:

No gain or loss shall be recognized if property is transferred to a corporation by one or more

persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. * * *

The parties have devoted much of their briefs to arguments whether the withdrawal of Schnack effected a termination or dissolution of the partnership Hawaiian Freight Association or whether as in this case, there being no provision in the partnership agreement specifically providing that the withdrawal of a partner should not terminate the partnership, the partnership did continue by operation of Hawaiian law with Leffel and Ballentyne as the partners during the period from March 8, the date of the agreement covering the withdrawal of Schnack, to April 30 when the transfer of the business to petitioner was finally and fully completed.

It is not necessary in our opinion to take up and discuss the arguments so made since here the facts and the applicable provisions of the statute never permit us to reach a point where such arguments might be material. Regardless of whether the partnership agreement did or did not contain a provision for continuation of the partnership upon the withdrawal of one of the parties and regardless of whether under the laws of Hawaii a partnership may be said to continue upon the withdrawal of a partner where

as here, there is no prior agreement for continuation, the facts present render these considerations immaterial. Here there was no intention on the part of anyone that the partnership should continue. The agreement in substance was that subject to Schnack's withdrawal the petitioner would be organized to take over the business and most, if not all, of the remaining assets of the partnership, Hawaiian Freight Association. Just when Schnack took down his share is not known but within five or six days of the agreement fixing the terms of his withdrawal petitioner was formed and the stipulated facts definitely show that the necessary steps to move to petitioner the business and that part of the assets it did acquire began immediately, even though the three weeks required to complete all business which had already been initiated and was then in process did not permit completion of the transfer until April 1, three weeks and one day after the effective date of Schnack's withdrawal. While the record is not specific on the point, presumably all business initiated after March 8 and completed after April 1, was regarded as the business of the petitioner although as hereafter shown in applying the statute it is really of little moment whether that was or not strictly the case. In any event any and all operations in the interval were transitional and were handled as they were merely as an expedient and an incident to the acquisition by petitioner of the partnership business and that part of the partnership assets agreed upon. We have no occasion, therefore, to concern ourselves with the law of Hawaii as to the continuation of a partner-

ship after the withdrawal of a partner since for the purposes here we have no such case. Cf. *Ransohoffs, Inc.*, 9 T. C. 376.

Our question accordingly is whether or not petitioner did acquire within the meaning of section 740(a)(1)(D) substantially all of the properties of Hawaiian Freight Association, the partnership which was organized on January 2, 1937, and which continued to the time when the agreements and understandings were reached under which the withdrawal of Schnack and his interests therein and the acquisition by petitioner of the partnership business and most, if not all, of the remaining assets were effected. If the transaction in question is to meet the requirements of the statute, it is necessary—first, that pursuant to the provisions of section 740(a)(1)(D) petitioner did acquire substantially all of the properties of that partnership and, second, that the acquisition was in an exchange to which section 112(b)(5) of the Code was applicable. To be within section 112(b)(5) the exchange must have been solely for stock or securities of petitioner, the acquiring corporation, and after the exchange the persons making the exchange must have been in control of petitioner and not only that but the stock received by each such person must have been substantially in the same proportion as his interest in the property prior to the exchange.

According to the stipulation the petitioner received for its stock the freight forwarding business, including good will, and up to \$30,000 of other partnership assets. Good will was listed at \$90,000 while the

other assets, including cash, receivables, furniture and fixtures, and stationery and supplies were listed at \$30,000.⁴ There is nothing showing that good will was ever carried on the books of the partnership in any amount. Beyond the figures at which the above items were transferred to petitioner we have no information as to the properties of the partnership or their value except such information as may be reflected by the individual accounts of the partners and by the Schnack agreement of March 8. We do know that Schnack withdrew as his share and interest in the partnership, \$8,000 net, which amount covered his original contribution to partnership capital and his pro rata part of the undrawn profits up to March 8. We know also that on January 1, 1940, Leffel's account showed a balance of \$17,244.81 and Ballentyne's account a balance of \$11,386.31, which amounts covered their original contributions to partnership capital and their shares of the undrawn profits at December 31, 1939. It is stipulated that the net income of the partnership for the period from January 1, 1940, to March 31, 1940, was \$27,662.94. Except for Schnack's withdrawal of \$8,000 as representing his interest in good will and other partnership assets plus his pro rata share of the 1940 profits to March 8, the record is silent as to withdrawals by any of the three partners. Inasmuch, however, as petitioner received only \$30,000 of the

⁴As to the \$30,000, the parties stipulated as follows:
Approximately \$30,000.00 of capital was required by the petitioner for its operations.

partnership assets, exclusive of good will, it would appear that withdrawals were made by Leffel and Ballentyne in unknown amounts and proportions. There is no contention, however, that such withdrawals as were made were not in keeping with the pro rata interests of the two individuals in the partnership as they originally existed, due effect being given to the withdrawal by Schnack of his interest.

From the above we think it clear that it may not be said that petitioner acquired substantially all of the assets of the Hawaiian Freight Association in exchange for its stock and accordingly it does not meet the test of section 740(a)(1)(D), *supra*. *E. T. Renfro Drug Co.*, 11 T. C. 994. Furthermore, due to the variance between the interests of Leffel and Ballentyne in the partnership it may not be said that the receipt by them on a 50-50 basis of the shares of the petitioner in exchange for the partnership assets represented a receipt by each of them of the said shares "substantially in proportion to his interest in the property prior to the exchange" so as to make the exchange an exchange to which section 112(b)(5) was applicable. See *E. T. Renfro Drug Co.*, *supra*.

The record is silent as to whether or not Oahu Railway and Land Company became an equal shareholder with Leffel and Ballentyne. Due to the fact that corporate returns subsequently filed by petitioner listed the interests of Leffel and Ballentyne as being $33\frac{1}{3}\%$ each it may be presumed that Oahu did subsequently become the owner of $\frac{1}{3}$ of the shares of petitioner. Regardless, however, of whether it did or did not, the determination in this case must turn

and does turn, as previously stated, on the exchange between Ballentyne and Leffel on the one hand and the petitioner on the other, and if Oahu did become a stockholder at a later time presumably it did so by acquiring from the two individuals portions of their shares.

Since the issue to be decided has been decided for the reasons set out above, it becomes unnecessary to consider various alternative issues or to determine whether or not the petitioner properly filed an election necessary to make the Amendment by the Revenue Act of 1942 to Supplement A of the Excess Profits Tax Title of the Internal Revenue Code applicable to its case.

It not being clear whether decision of the issue presented by the parties and decided herein for the respondent is basis for entry of decision for the respondent without computation by the parties.

Decision will be entered under Rule 50.

[Seal]

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: Sept. 20, 1950. Place: Washington, D. C.
Docket No. 19283.

Proceeding: *Hawaiian Freight Forwarders, Ltd.*

Assigned to: Judge Arundell.

Counsel: For Petitioner: None. For Respondent:
Robert C. Whitley, Esq.

Stenographic Reporter: Johnson. Hearing:
[cc] Transcript Ordered: No.

On motion of Settlement.

Ordered: Referred to Judge Turner.

RALPH A. STARNES,
Deputy Clerk.

[Title of Tax Court and Cause.]

NOTICE OF FILING AND HEARING
MOTION

Please Take Notice the Petitioner has filed a motion in the above-entitled proceeding, a copy of which is enclosed herewith.

This motion has been placed on the Calendar for hearing Nov. 1, 1950 before a Division of the Court at Custom House Court, Room 421, Appraisers Bldg., 630 Sansome Street, San Francisco, California.

No further notice of this hearing will be sent.

Dated: October 17, 1950.

/s/ VICTOR S. MERSCH,
Clerk.

To: Louis Janin, Esq.

1104 Mills Tower, San Francisco, Calif.

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: Nov. 1, 1950. Place: San Francisco, Calif.
Docket No. 19283.

Proceeding: Hawaiian Freight Forwarders.

Assigned to: Judge Bolon B. Turner, Division
No. 8.

Counsel: For Petitioner, Louis Janin, Esq., Har-
old E. Haven, Esq. For Respondent, T. M. Mather,
Esq.

Stenographic Reporter: Johnson. Hearing: 2:30p-
3:50p. Transcript Ordered: Yes.

On the merits: Yes.

On motion of petitioner for reconsideration.

Motion for correction and enlargements of find-
ings of fact.—Denied.

Motion for Reconsideration.—Denied.

CLIFTON H. JACK,
Deputy Clerk.

The Tax Court of the United States
Washington

Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Findings of Fact and Opinion promulgated July 31, 1950, the respondent on August 22, 1950, having filed a proposed recomputation of the tax involved in accordance therewith, and the petitioner on February 2, 1951, having filed an acquiescence in such recomputation, it is

Ordered and Decided: That there is a deficiency in excess profits tax for the fiscal year ended November 30, 1943, in the amount of \$21,424.70; and that there is a deficiency in excess profits tax for the fiscal year ended November 30, 1944, in the amount of \$7,403.23.

Entered: February 7, 1951.

/s/ BOLON B. TURNER,
Judge.

Served: February 8, 1951.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Hawaiian Freight Forwarders, Ltd., the petitioner in this cause, by Louis Janin and Harold E. Haven, its counsel, hereby files its petition for a Review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on February 7, 1951 (15 T.C., No. 7) determining deficiencies in petitioner's excess profits taxes for its fiscal years ended November 30, 1943 and November 30, 1944, in the respective amounts of \$21,424.70 and \$7,403.23, and respectfully shows:

I.

The petitioner, Hawaiian Freight Forwarders, Ltd., is a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii with its principal office in Honolulu, Territory of Hawaii.

This petition is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code, as amended. The returns for the taxes in controversy were filed with the Collector of Internal Revenue in Honolulu, T. H., which city is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

II.

Nature of the Controversy

The controversy involves the petitioner's liability

for excess profits taxes for its fiscal years ended in 1943 and 1944. The respondent determined and the Tax Court found that petitioner was liable for such taxes in the amounts of \$21,424.70 and \$7,403.23 for the respective years involved.

The basic question presented to the Tax Court was whether petitioner was entitled to the benefits of "Supplement A" (Sections 740-744) of the Internal Revenue Code. The provisions of Supplement A were added to the Code as a relief or remedial measure to permit corporations to utilize the base period earnings experience of certain predecessor corporations, partnerships and sole proprietorships.

The petitioner was organized on March 13 or 14, 1940 to succeed to the business and most of the assets of a partnership. Having no base period experience of its own, and having a small invested capital, its credit for excess profits tax purposes is nominal unless it may use the earnings experience of the predecessor business. The difference in credit involved amounts to approximately \$17,500 for the year ended in 1943 and \$16,700 for the year ended in 1944, exclusive of unused excess profits credit adjustments.

The predecessor business had been in existence since January 1, 1937, as a partnership. One of the partners was completely inactive in the business. He withdrew, with the consent of the others, on March 8, 1940, five or six days before the petitioner was organized, being paid \$8,000 by partnership check for his capital interest and undrawn profits. This money was not needed in the business.

From March 8, 1940, the interests of the two remaining partners were equal, each owning a one-half interest in the partnership, its assets and its profits. They continued to operate the business during the brief period required for the formation of the petitioner corporation and the transfer of the partnership properties to it.

The transfer was fully effected by March 31, 1940, each of the partners receiving 50 per cent of petitioner's stock. The Commissioner at all times has treated the exchange as tax-free.

The principal question presented under these facts was whether the withdrawal of the inactive partner, owning only a 14.8% capital interest, acquiesced in by the active partners who continued the business, deprives petitioner of the relief it sought. The respondent originally had allowed such relief but in his determination herein utilized the credit on an invested capital basis without any explanation whatsoever, but apparently on the ground that the withdrawal of the inactive partner resulted in the immediate termination of the partnership and in the creation of a new partnership. Petitioner contended that this did not result under Hawaiian law, and also questioned the applicability and legality of the respondent's regulation.

Question was raised as to whether substantially all of the assets (more properly "properties") of the partnership were transferred to the corporation. The government contended that two partnerships were involved and that the assets transferred were

not substantially all of the properties of the partnership which was in existence prior to March 8, 1940, thereby merely presenting a different face on the primary issue rather than a different issue.

A subsidiary issue was whether petitioner was entitled to the benefits of Supplement A for its prior years in determining its unused excess profits tax credit. In order to obtain this benefit, petitioner was required to elect the same. Petitioner and the representatives of the Bureau had mistakenly believed it was entitled to the credit under prior law, and the return filed and agent's reports were prepared and submitted on that basis. Petitioner has always claimed on the Supplement A basis and contended before the Tax Court (a), that a valid election was made, and (b) that the Commissioner was estopped to assert otherwise.

III.

Specifications of Error

Petitioner specifies as error the following acts and omissions of the Tax Court of the United States:

1. The Court erred in assigning the controversy for determination to a Division of the Court other than that to whom the controversy was presented, such action being without authority of law and contrary to the statutory provisions establishing the Court and providing for the manner of exercise of its functions.

2. The Court erred in having a Division other than that to whom the controversy was presented de-

termine the same by findings of fact and opinion, and decision pursuant thereto, such acts being without authority of law, contrary to the statutory provisions establishing the Court and providing for the manner of exercise of its functions.

3. The Court erred in failing and refusing to make written findings of fact as required by law.

4. The Tax Court erred in finding:

“Just when Schnack took down his share is not known * * *,”

the stipulation stating (Par. 4):

“The payment of the \$8,000 referred to therein was by check of the partnership drawn March 8, 1940.”

5. The Court erred in finding:

“Furthermore, due to the variance between the interests of Leffel and Ballentyne in the partnership it may not be said that the receipt by them on a 50-50 basis of the shares of the petitioner in exchange for the partnership assets, represented a receipt by each of them ‘substantially in proportion to his interest in the property prior to the exchange’ so as to make the exchange an exchange to which section 112(b)(5) was applicable,”

and in failing and refusing to find, as stated in the stipulation (Par. 4):

“After the withdrawal of A. G. Schnack, Ballentyne and Leffel were equal partners in the business conducted by Hawaiian Freight Association.”

6. The Court erred in finding (p. 9):

“Except for Schnack’s withdrawal of \$8,000—the record is silent as to withdrawals by any of the three partners.”,

the stipulation (Par. 10) showing an annual record of the capital earnings and withdrawals of each partner and particularly showing that the balance of the profits of each year was withdrawn in the next year.

7. The Court erred in finding that the understanding between Leffel, Ballentyne and Oahu Railway and Land Company amounted to an “arrangement” or an “agreement”, it being no more than a general understanding without legal force.

8. The Court erred in determining that “Schnack was not included in the plans for the new corporation”, his non-participation being purely voluntary on his part.

9. The Court erred in finding:

“Here there was no intention on the part of anyone that the partnership should continue,”

such finding being without evidentiary support and the stipulated facts clearly establishing that it did continue with Ballentyne and Leffel as equal partners from March 8, 1940 and until April 1, 1940, while petitioner was being organized and the transfers to it were being made.

10. The Court erred in failing and refusing to find that under the facts as stipulated and proved, and under the law of the Territory of Hawaii, the

partnership, Hawaiian Freight Association was not terminated by Schnack's voluntary withdrawal, but continued for at least the brief period necessary to wind up its affairs, at least until April 1, 1940.

11. The Court erred in determining that the question of whether one partnership was terminated and a new partnership created by the withdrawal of Schnack could be answered without reference to the law of Hawaii, and in refusing to consider such law as applicable to the issue.

12. The Court erred in finding that petitioner did not acquire substantially all of the assets of Hawaiian Freight Association, and in failing and refusing to find that petitioner acquired substantially all of the properties of said predecessor partnership.

13. The Court erred in determining that the exchange by two equal partners remaining after the withdrawals of Dr. Schnack for petitioner's stock in equal amounts was not a tax-free exchange within the ambit of Section 112(b)(5).

14. The Court erred in failing and refusing to follow the doctrine of judicial notice with respect to the proceedings involving the same parties and reported as a memorandum opinion May 29, 1947 (6 T.C.M. 601), said proceedings having been called to the Court's attention, and the doctrine being applicable to establish:

(a) The time when and manner by which Oahu Railway and Land Company became a shareholder.

(b) Additional evidence of the fact that petitioner did acquire substantially all the properties utilized in the business conducted by the predecessor partnership.

(c) Confirmation that the acquisition by petitioner of such properties was within the ambit of Section 112(b)(5) as determined by the Commissioner and that no issue under Section 112(b)(5) was presented for the Court's determination.

15. The Court erred in failing and refusing to find and determine that the petitioner was entitled to the benefits of the optionally retroactive amendments to Supplement A provided by the Revenue Act of 1942.

16. The Court erred in failing and refusing to find and determine that the petitioner had made a valid election to have Supplement A as amended by the Revenue Act of 1942 applied retroactively.

17. The Court erred in failing and refusing to find and determine that the Commissioner was estopped to assert that a valid election for the retroactive application of Supplement A had not been made.

18. The Court erred in failing and refusing to find and determine that under the facts as stipulated and the evidence presented, the petitioner had made a prima facie case as to each and every issue involved in the proceeding, and that no contrary or contradictory evidence existed to refute such prima facie case.

19. If the Court did not err in determining that the Partnership, Hawaiian Freight Association, was terminated by reason of Schnack's withdrawal, then the Court erred in failing and refusing to find and determine that the withdrawal of Schnack, the equalization of the interests of Leffel and Ballentyne, the organization of petitioner and the transfer of the partnership assets and business to petitioner were all parts of one transaction qualifying petitioner under Supplement A.

20. If the Court did not err in determining that the said partnership Hawaiian Freight Association was terminated on March 8, 1940, it erred in not determining that the respondent's regulation to the effect that a partnership cannot be an acquiring corporation was illegal and void as applied in this matter.

21. The Court erred in denying petitioner's motion for correction and enlargement of the Findings of Fact and Opinion, such denial being an abuse of discretion.

22. The Court erred in denying petitioner's motion for reconsideration, such denial being an abuse of discretion.

23. The Court erred in determining any deficiency against the petitioner for excess profits taxes for the years ended in 1943 and 1944.

IV.

The said petitioner, being aggrieved by the findings of fact and conclusions of law contained in the

Findings of Fact and Opinion of the Tax Court promulgated July 31, 1950 (15 T.C. . . . No. 7) and the decision entered pursuant thereto on February 7, 1951, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

Dated, May 1, 1951.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

Duly Verified.

Received and Filed T.C.U.S. May 4, 1951.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

Hawaiian Freight Forwarders, Ltd., petitioner on review, by and through its attorneys, Louis Janin and Harold E. Haven, hereby designate the portions of the record and the evidence to be included in the

record on review in the above entitled proceeding, as follows:

The entire record exclusive of formal headings.

You are hereby respectfully requested to prepare and certify the record on review in accordance with the foregoing designations and in accordance with the law and the rules of the United States Court of Appeals for the Ninth Circuit, and to transmit the same to the Clerk of said Court for filing.

Dated: May 2, 1951.

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

Counsel for Petitioner.

Received and Filed T.C.U.S. May 4, 1951.

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To the Commissioner of Internal Revenue, and to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.

You are hereby notified that the petitioner, on May 2, 1951, mailed for filing with the Clerk of the Tax Court of the United States, Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause. A copy of the peti-

tion for review is hereto attached and served upon you.

Dated this second day of May, 1951.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

Acknowledgment of Service attached.

Filed T.C.U.S. May 9, 1951.

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

To: Charles Oliphant, Chief Counsel, Bureau of Internal Revenue

You are hereby notified that Hawaiian Freight Forwarders, Ltd., did, on the 4th day of May, 1951, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a designation of contents of record on review for the Ninth Circuit, in the above entitled case. Copy of the designation of contents of record on review as filed is hereto attached and served upon you.

Dated this 8th day of May, 1951.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the U. S.

Acknowledgment of Service attached.

Filed T.C.U.S. May 9, 1951.

The Tax Court of the United States

Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Court Room 421, Appraisers Building,
San Francisco, Calif., Friday, May 13, 1949
(Met, pursuant to notice, at 2:45 o'clock p.m.)

Before: Hon. Ernest H. Van Fossan, Judge.

Appearances:

Louis Janin, Esq., appearing on behalf of Petitioner.

W. J. McFarland (Hon. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue) appearing for the Respondent. [1*]

PROCEEDINGS

The Clerk: Docket No. 19283, Hawaiian Freight Forwarders, Ltd.

Will you state your appearances?

Mr. Janin: Louis Janin, appearing for the Petitioner.

Mr. McFarland: W. J. McFarland, appearing for the Respondent.

Mr. Janin: If your Honor please, this proceeding involves Section 740 to 744 of the Internal Revenue Code, commonly known as Supplement A, and

* Page numbering appearing at top of page of original certified Reporter's Transcript.

it involves the liability of the Petitioner for excess profit taxes for its year ended November 30, 1943, in the amount of \$21,424.70, and for the year ended November 30, 1944, in the amount of \$7,403.23.

Your Honor may recall that you previously heard a case involving the same Petitioner, I believe, the last time you were here in San Francisco.

The Court: It did not involve the same question?

Mr. Janin: It involved the same question as an auxiliary issue, which became unnecessary in view of your determination on the principal issue, your Honor.

The basic issue involved is whether Petitioner is entitled to the benefits of Supplement A, as amended, by the Revenue Act of 1942, for its fiscal year ended in 1943, and the year subsequent thereto, and also whether Petitioner effectively elected to have those provisions, as amended, by [3] the Revenue Act of 1942, apply to these earlier years.

The Petitioner was organized on March 14, 1940, and by April 1 of that year had acquired the business and principal assets of the predecessor partnership. This partnership was organized under the name "Hawaiian Freight Association", in January of 1937, and then consisted of three partners:

J. C. Leffel, G. C. Ballentyne, and Dr. A. G. Schnack. Dr. Schnack's interest was that of an investor, rather than that of an active partner. On March 8 of 1940, just six days prior to the formation of the Petitioner corporation, Dr. Schnack's interest was acquired, in effect, by Mr. Ballentyne. Dr. Schnack then withdrawing from the partnership.

For the remainder of the short period in 1940, that left two partners, Ballentyne and Leffel, sharing equally in the profits. By April 1, the transfer to the corporation was completed.

The basic issue, therefore, resolves itself to the determination of whether or not withdrawal by Dr. Schnack on March 8, 1940, effected such a dissolution and termination of the partnership that it was not a component corporation under the provisions of Supplement A. In other words, if there were two partnerships, rather than one partnership, involved, the Government was entitled to win in this proceeding.

It is the Petitioner's position, of course, that that withdrawal did not in and of itself effect dissolution [4] of the partnership. The business as continued without interruption, and Dr. Schnack at no time performed services of a business nature to the partnership, but was in the position of a static investor. His withdraw, therefore, did not affect the operations of the business in any respect. Furthermore, under the laws of the Territory of Hawaii, while the withdrawal of a partner may be a cause for dissolution, it does not ipso facto effect a dissolution. At least, where more than two partners are involved.

The Court: They have adopted the Partnership Act?

Mr. Janin: Yes, quite comparable in some respects to the Uniform Partnership Act, although the statutory law in Hawaii is by no means as well expressed or codified as is true under the Uniform Partnership

Act. There is a provision, for example, under the Hawaiian law, for a dissolution to be effective, a certificate of dissolution must be executed and filed by the partners with the Treasurer of the Territory of Hawaii. In this case, that was not done until July of 1940.

With respect to the other issue involved, that is, the election made by the Petitioner, the Revenue Act of 1942, amending the provisions of Supplement A, made those applicable to the Petitioner for the first time. Petitioner, however, had believed that it was entitled to the provisions of Supplement A for its prior years and all of its excess profit tax returns have been computed on the theory that it was so [5] entitled. The error made by the Petitioner and by its accountants are also adopted in two revenue agents' reports, and it is the position of the Petitioner in this case that it so effectively complied with the regulations with respect to the election that its failure to formally state that it made the election, the only thing that was omitted, should not govern against it.

I might say that all of the pertinent facts in the issues have been stipulated.

The Court: Mr. McFarland.

Mr. McFarland: If the Court please, as Mr. Janin has stated, the primary issue is whether the Petitioner is entitled to compute its excess profits credit under the provision of the Supplement A, as provided by Section 740 to 744 of the Code.

With respect to the first consideration on that

broad issue, as framed by the pleadings, it is the Respondent's position that, in effect, with the agreement of March 8, 1940, whereby Dr. Schnack ceased participation in the partnership, in effect, terminated that partnership, and another partnership was created, in which Ballentyne and Leffel were the partners. It was their experience that the Petitioner here acquires and is not entitled, under the provisions of the Code and the regulations, to acquire the experience of the prior partnership, that is, the partnership that was in [6] existence prior to March 8, 1940. That is the basic issue, and the facts reveal that the second partnership, if I might so typify it, did not begin its existence before March 8, and this is directly in face of the requirements of Section 712(a) to the effect that a domestic corporation must compute its excess profit credit under Section 714, unless its existence prior to January 1, 1940, be established through a component corporation, in accordance with Section 740(f). It is also contra to the application of Section 740(c), which requires a component corporation to be in existence on the date of the beginning of the taxpayer's base period. The facts with respect to the issue have been stipulated and also the facts with respect to the issue around about the election have been stipulated.

It is the Respondent's position in that connection that the Petitioner could not have either actually or effectively complied with the terms of an election before that election became applicable, and the provisions of the 1942 Act first contend the necessity or the provisions or an election in certain cases, and

this happens to be one of them. The Petitioner's excess profits tax returns for the years 1940 and 1941 had been filed prior to the enactment of the Revenue Act of 1942, upon which the regulations with respect to the election were promulgated. Now, that issue, however, is pertinent only insofar as it determines the nature and [7] the extent of the excess profit credit and carry forward for the years 1940 and 1941.

I believe that adequately covers the issues, doesn't it, Mr. Janin?

Mr. Janin: You had suggested at one time, Mr. McFarland, that you might make an issue of the transference of substantially all of the assets of the partnership. I believe that issue may be, I should say, rather than "issue", that is the position that I will avail myself of upon brief, based upon the facts that we have stipulated, and that position, of course, is based upon the Court's decision in the Renfro Drug Company case. That has to do with the transference of a substantial or an unsubstantial portion of the assets between the Petitioner's predecessor, the partnership, and the petitioner, but that will be apparent, I am sure, upon brief, and there will be no misunderstanding on that point.

There is one amendment that I would like to make to my opening statement. That is, even if this Court holds that there are two partnerships involved here as predecessor and the Petitioner corporation, the Petitioner will argue on brief that the regulations which prohibit the tacking on of partnership experience was void.

The Court: You may submit the stipulation. Are there exhibits attached to it?

Mr. McFarland: There are, if the Court please. [8] The last exhibit is 2(B).

The Court: The stipulation is received as evidence in the case.

Do you have anything further to submit?

Mr. Janin: Yes, I have a number of exhibits, if your Honor please.

The Court: You may proceed.

Mr. Janin: I will offer in evidence at this time a certified copy of the Statement of Co-Partnership from the Hawaiian Freight Association, filed and recorded in the Office of the Treasurer of the Territory of Hawaii, on February 20, 1937.

Mr. McFarland: No objection.

The Court: Exhibit 3.

(Whereupon, the document marked Petitioner's Exhibit 3 was received.)

[Printer's Note: Petitioner's Exhibit 3 is set out in full at pp. 119-121 of this printed record.]

Mr. Janin: I will offer at this time a certified copy of the Statement of Dissolution of the Co-Partnership of the Hawaiian Freight Association, filed and recorded in the same office on July 3, 1940.

Mr. McFarland: No objection.

The Court: Exhibit 4.

(Whereupon, the document marked Petitioner's Exhibit 4 was received.)

[Printer's Note: Petitioner's Exhibit 4 is set out in full at pp. 122-124 of this printed record.]

Mr. Janin: I will offer at this time a certificate [9] of the Treasurer of Hawaii to the effect that no statement of any other partnership under the same name and style was at any time prior to April 30, 1940, registered with the Treasurer.

Mr. McFarland: No objection.

The Court: Exhibit 5.

(Whereupon, the document marked Petitioner's Exhibit 5 was received.)

[Printer's Note: Petitioner's Exhibit 5 is set out in full at page 125 of this printed record.]

Mr. Janin: I will offer at this time the report of Tennent & Greancy, covering the year ended November 30, 1940.

Mr. McFarland: No objection.

The Court: Is this a financial report?

Mr. Janin: This is an audit report, yes.

The Court: Exhibit 6.

(Whereupon, the document marked Petitioner's Exhibit 6 was received.)

Mr. Janin: I will offer at this time for the limited purpose of showing that the Internal Revenue agents in making audits of the return of the Hawaiian Freight Forwarders, Ltd., originally determined that it was entitled to the benefits of Supplement A without an election, the report submitted to the taxpayer, dated June 2, 1944, covering the fiscal year ended November 30, 1941.

The Court: Exhibit 7.

(Whereupon, the document marked Petitioner's Exhibit 7 was received.) [10]

[Printer's Note: Petitioner's Exhibit 7 is set out in part at page 126 of this printed record.]

Mr. Janin: I likewise offer a similar report submitted to the taxpayer on February 19, 1945, and covering the year ended November 30, 1942.

The Court: Exhibit 8.

(Whereupon, the document marked Petitioner's Exhibit 8 was received.)

[Printer's Note: Petitioner's Exhibit 8 is set out in part at page 127 of this printed record.]

Mr. Janin: I have no further exhibits to offer, your Honor.

Mr. MacFarland, will you stipulate that if Dr. A. G. Schnack were present and called as a witness on behalf of the Petitioner, he would testify to the following effect:

That he is a physician and surgeon, now residing in Corona, California, but formerly and until March 31, 1940, he resided in Honolulu, Territory of Hawaii, and that from January 2, 1937 until March 8, 1940, he was a member of a partnership known and designated as Hawaiian Freight Forwarders, Ltd., engaged in the freight forwarding business; that he rendered no services to said partnership in its ordinary day to day business operations; and that he did not, except for once or twice a year, call at the

partnership offices; and that on occasions, which were rather infrequent, his primary purpose was social rather than business, he did inquire of Mr. G. C. Ballentyne, an active partner, as to the status of the partnership and its business; that he did not offer suggestions as to the conduct of such business; and that his withdrawal [11] from the partnership on March 8, 1940, was with the consent of his co-partners, Mr. Leffel and Mr. Ballentyne.

The Court: Do you stipulate to that?

Mr. McFarland: So stipulated.

I have some returns that I would like to introduce, if the Court please.

The Court: Proceed. There will be no objections to these returns?

Mr. Janin: No objections to the returns.

Mr. McFarland: Respondent's Exhibit C, the 1936 income and excess profits tax return of the Hawaiian Freight Association, Ltd.

The Court: Exhibit C.

(Whereupon, the document marked Respondent's Exhibit C was received.)

Mr. McFarland: Respondent's Exhibit D, the final partnership return of income for 1940 of the Hawaiian Freight Association.

The Court: Exhibit D.

(Whereupon, the document marked Respondent's Exhibit D was received.)

Mr. McFarland: Respondent's next exhibit in order, the final return, amended, of the Hawaiian

Freight Association, being a partnership return of the income for 1940.

The Court: E follows. [12]

Mr. McFarland: Thank you very much.

(Whereupon, the document marked Respondent's Exhibit E was received.)

[Printer's Note: Respondent's Exhibit E is set out in part at page 129 of this printed record.]

Mr. McFarland: Respondent's Exhibit F, a corporation income and declared value excess profits and defense tax return for 1940 of the Hawaiian Freight Forwarders, Ltd.

The Court: Exhibit F.

(Whereupon, the document marked Respondent's Exhibit F was received.)

Mr. McFarland: Respondent's Exhibit G, the corporation excess profits tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year 1940.

The Court: Exhibit G.

(Whereupon, the document marked Respondent's Exhibit G was received.)

Mr. McFarland: Respondent's Exhibit H, the Hawaiian Freight Forwarders, Ltd., corporation income and declared value and excess profits tax return for the taxable year November 30, 1941.

The Court: Exhibit H.

(Whereupon, the document marked Respondent's Exhibit H was received.)

Mr. McFarland: Respondent's Exhibit I, the cor-

poration excess profits tax returns of Hawaiian Freight Forwarders, Ltd., for the taxable year ended November 30, 1941.

The Court: It will be received. [13]

(Whereupon, the document marked Respondent's Exhibit I was received.)

Mr. McFarland: Respondent's Exhibit J, the corporation income tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year November 30, 1942.

The Court: Exhibit J.

(Whereupon, the document marked Respondent's Exhibit J was received.)

Mr. McFarland: Respondent's Exhibit K, the corporation excess profits tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year November 30, 1942.

The Court: Exhibit K.

(Whereupon, the document marked Respondent's Exhibit K was received.)

Mr. McFarland: Respondent's Exhibit L, the corporation income and declared value excess profits tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year November 30, 1943.

The Court: Exhibit L.

(Whereupon, the document marked Respondent's Exhibit L was received.)

Mr. McFarland: Respondent's Exhibit M, the

corporation excess profits tax return of the Petitioner for the year ended November 30, 1943.

The Court: Exhibit M. [14]

(Whereupon, the document marked Respondent's Exhibit M was received.)

Mr. McFarland: Respondent's Exhibit N, the corporation income and declared value excess profits tax return of the Petitioner for the year ended November 30, 1944.

The Court: Exhibit N.

(Whereupon, the document marked Respondent's Exhibit N was received.)

Mr. McFarland: Respondent's Exhibit O, the corporation excess profits tax return for the Petitioner for the taxable year ended November 30, 1944.

The Court: O is received.

(Whereupon, the document marked Respondent's Exhibit O was received.)

Mr. McFarland: Respondent's Exhibit P, the corporation income and declared value excess profits tax return of the Petitioner for the taxable year ended November 30, 1945.

The Court: Exhibit P is received.

(Whereupon, the document marked Respondent's Exhibit P was received.)

Mr. McFarland: Respondent's Exhibit Q, the corporation excess profits tax return of the Petitioner for the taxable year ended November 30, 1945.

The Court: Exhibit Q.

(Whereupon, the document marked Respondent's Exhibit Q was received.) [15]

Mr. McFarland: Respondent rests.

The Court: This case lends itself to simultaneous briefs, doesn't it?

Mr. McFarland: Very well.

The Court: How much time do you want?

Mr. McFarland: Thirty days.

The Court: Thirty days for original briefs, and serve copies on each other.

Mr. Janin: I would like a longer period for the reason that I have two cases in the Circuit Court that, I believe, are coming on shortly. That will interrupt my briefing time.

The Court: Forty-five days?

Mr. Janin: Forty-five days.

The Court: With twenty days for reply? Serve copies on each other?

Mr. Janin: Yes, sir.

Mr. McFarland: Very well.

The Court: That concludes the calendar.

We will recess until Monday morning at 9:30.

(Whereupon, at 3:10 o'clock p.m., the hearing in the above-entitled matter was concluded.) [16]

[Endorsed]: Filed June 3, 1949.

[Title of Tax Court and Cause.]

Court Room 421, Appraisers Building,
San Francisco, Calif., Wednesday, Nov. 1, 1950
Before: Hon. Bolon B. Turner, Judge.

PROCEEDINGS

The Clerk: Docket No. 19283, Hawaiian Freight Forwarders, Ltd.

Louis Janin for the Petitioner.

T. M. Mather for the Respondent.

Opening Statement on Behalf of the Petitioner
By Mr. Janin

Mr. Janin: If Your Honor please, you entered a decision in this case, a findings of fact and opinion in this case, a little over two months ago, and on receipt of the taxpayer's copy of the same we were definitely dissatisfied with it and we filed motions for a correction and an enlargement of the findings of fact and opinion, and for reconsideration of the issues presented to the Court.

I think a part of the difficulty which the Court had with the case was definitely my own fault. I think that part of it was a mis-interpretation of the opening statement made by counsel for both sides, and part of it was due, perhaps, to your not having the personal knowledge of the background of the case that was true of Judge Van Fossan, to whom the proceeding was presented.

This case was an aftermath of a prior case which had been presented to Judge Van Fossan and decided by him prior to the hearing in this matter. Therefore, in presenting the case before Judge Van Fossan there was less put into the [3] record than would otherwise have been definitely considered as necessary.

The Court: Why do you say that? He could only decide it on the record, regardless of what he had known outside the record.

Mr. Janin: He would decide it on the record and

by taking judicial notice of the record in the prior proceeding before the Tax Court involving the same parties.

The Court: We were recently reversed on that in the Funk case.

Mr. Janin: I am not familiar with that decision.

The Court: We had our knuckles very severely cracked on a mistaken impression, that is, where we had taken judicial notice of another proceeding involving the same parties in the Funk case.

Mr. Janin: I do not recall that.

The Court: That was a Third Circuit case.

Mr. Janin: I do not recall that.

The Court: I, as a matter of fact, know something about the prior proceeding. I was Presiding Judge when Judge Van Fossan decided the other case, and the Presiding Judge reviews all reports of the other fifteen judges to determine whether or not they are to go out, or whether they go to Conference. So I was aware of the other case.

Mr. Janin: Yes. [4]

The Court: All right. Go ahead.

Mr. Janin: In the opening statements made before this Court, with Judge Ernest Van Fossan presiding, there were two principal issues presented for the Court's decision, as stated by counsel.

The first issue was whether the change in the partnership which occurred by reason of Dr. Schnack's withdrawal on March 8, 1948, made it impossible for this Petitioner to utilize its predecessor's earnings.

The second issue was applicable only for excess

profits credit carry-over purposes, and that was whether the Petitioner had failed to make sufficient election and was, therefore, barred from the retro-active application of the provisions of Supplement A.

In addition to that, Mr. McFarland, who was at that time a representative of the Chief Counsel's Office, stated that he intended to raise an issue that not substantially all of the assets of the predecessor partnership had been transferred to the petitioner corporation, and that he would make his position on that issue clear in his brief. I think an examination of his brief shows he did clarify that statement and that he was contending was that there was cash representing earnings, or earnings represented in the form of cash of the partnership which had not been transferred to the corporation and that he at no time was contending that [5] there were operative properties of any kind which had not been transferred to the corporation and that, Your Honor, is the fact. All the properties utilized by the partnership in this freight forwarding business were transferred to the petitioner corporation.

As a matter of fact, Your Honor did find, on Page 4 of the mimeographed opinion "the petitioner in exchange for its 6,000 shares of stock received the going business of Hawaiian Freight Association and most, if not all, of its remaining assets."

Later on in your Findings of Fact and Opinion you found that substantially all of the assets had not been transferred.

The Court: I think we ought to come to an understanding here on one point, because I think that that

will have a bearing on your development of what you have to say.

In the first place, I made no Findings of Fact.

Mr. Janin: You made no formal findings, no.

The Court: The facts were stipulated and I found them as stipulated. So your formal findings of fact are your stipulated facts. Any discussion here may be subject on your part, and I assume it is, to the feeling that I have in my discussion, and applying the law, misconstrued the Findings of Fact. But the Findings of Fact in this case are [6] the stipulated Findings of Fact. I made no Findings of Fact.

Mr. Janin: I did not understand that clearly. I am glad you brought it out. I remember the reference in the opinion to the facts as stipulated.

The Court: It is stated in the opinion, "the facts have been stipulated and as stipulated are so found." You will notice I made no Findings of Fact.

Mr. Janin: That is right. Of course, the Findings of Fact can appear in the body of the opinion, and I think that when there is a factual discussion in the body of the opinion that certainly an ambiguity arises as to whether the statements of fact so appearing are not findings.

The Court: The Ninth Circuit says "No." The Ninth Circuit is very decided on that point. They will not accept a statement, even if you say in your opinion that the fact is thus and so, and we so find over in the opinion. They have thrown that out and have remanded cases to us for doing that. So here in the Ninth Circuit particularly anything stated as

a fact, as a discussion in the opinion, they insist on segregated and separate findings where that is so.

That is one reason why we are very careful about that in the Ninth Circuit.

Mr. Janin: In the Findings of Fact and Opinion, as rendered by the Court, there are two bases for the Court's [7] decision:

One, that substantially all of the assets were not transferred to the petitioner corporation.

The other is that the transaction did not qualify as a tax-free transaction under Section 112(b)(5) of the Internal Revenue Code.

Now, as to the latter point, of course, it is I think very clear, from reading the opening statement of counsel before the Court, that Section 112(b)(5) was not an issue presented to the Court for its consideration. The deficiency notice determined the transfer to be tax-free. There was no step-up of bases on any of the assets, or no change in bases whatever with respect to any of the assets transferred from the predecessor partnership to the corporation and utilizing, as it did, the invested capital method, the Commissioner's determination of excess profits credit is predicated on the cost of the assets to the predecessor partnership. In fact, the Revenue Agent's reports and deficiency notices, which appeared as exhibits to the petitions in the two prior docketed proceedings, disclosed that the Commissioner was perfectly satisfied that Section 112(b)(5) had been fully met and that we had a tax-free transfer here.

Again, in the Agent's reports, which were introduced as exhibits in this case, Section 112(b)(5) was

recognized as being applicable and contrary to the position [8] later taken in the deficiency notice where the Supplement A provisions were treated as being applicable.

Mr. McFarland had been the Government counsel in the prior proceeding also and, of course, Mr. McFarland and myself had discussed the issues at quite some length. I think we had a very complete understanding as to what the issues were and I think it was unfortunate that we did not perhaps more clearly limit our statement of the issues to the Court so that there wouldn't have been any opportunity for confusion on the matter.

Mr. McFarland's point on the other issue on which the Court rendered its decision was merely that the partnership should have retained its cash earnings and transferred those to the corporation.

The Court: What is that statement again?

Mr. Janin: Mr. McFarland's position was that the partnership should have retained its earnings in the form of cash and transferred that cash to the petitioner corporation in order to qualify under Section 112(b)(5). There was never any contention on Mr. MacFarland's part that their operative properties of the business were not transferred. I think perhaps the term "assets" and "properties" deserve a little further consideration.

The Court: Before you pass on, I think you will find in here—I haven't looked at this for some time—but [9] I think you will find in here that in my treatment of the case my findings are based on the determination that the parties themselves made of

the partnership interest as of the beginning of this short period. I think that somewhere in here I commented that as to any profits that were realized between the first of the year and the other, I didn't know what happened to those; I didn't know what they were. So, on the factual situation that is covered in "3" and "4", where I was going to determine for myself, for discussion, the facts there because some of the facts as stipulated required a little mathematical computation, but not any change of facts.

I pointed out in the footnote that the distributions that were made, and the payoff made as to partnership interest, were on the basis of the reports of the Certified Public Accountants showing the partnership interests at December 31, 1939, and it was on the basis of that that the amount was determined that Dr.—what is the name?

Mr. Janin: Dr. Schnack.

The Court: —Dr. Schnack got.

Mr. Janin: He received \$8,000.00 on March 8.

The Court: That was not a matter of earnings. The \$8,000.00 that Dr. Schnack received, that was his partnership share.

Mr. Janin: His entire partnership share of both [10] profit and accumulated earnings.

The Court: That was the basis of my determination.

Mr. Janin: I am sorry, Your Honor, but I do not think that is very clear from a reading of the opinion.

The Court: Well, perhaps you can show me where

it isn't. I will say this for you: That I do think you had a bad stipulation of facts, and I think it was very difficult to read those facts and to know just exactly what the facts were. You had to, in order to verify some of the things in the facts, take a pencil and sit down and do some computing to verify some of the things that were in there. The difficulty experienced with that is the reason why I made it clear that my discussion on Page 4, for instance, was drawn from the stipulation of facts, and that that was my statement on Page 4, but that the facts were stipulated as set forth in the footnote. In order that no one would be misled as to what was stated in my discussion, I set that forth in a footnote to show what you did stipulate.

Mr. Janin: I think the pertinent portion of your discussion——

The Court: Those statements down there, the break-down between capital and undrawn profits, that was taken from one of your exhibits as a part of your stipulation of facts.

Mr. Janin: Yes. The stipulation of facts discloses [11] that the total of the partnership capital and undrawn profits, at December 31, 1939, was approximately \$30,000.00—I think it was slightly over \$30,000.00—and there was \$30,000.00 of assets, cash and other assets, transferred to the petitioner corporation.

The Court: Except on one of your exhibits, as a part of your stipulation as to the assets received by the Hawaiian Freight Association, as to what it got, and that is a stipulated fact—I didn't try to analyze it but I took it as a stipulation of fact—is

not \$30,000, but is \$120,000, and \$90,000 of that is good-will. And because that was at variance with the statement that what the corporation did get was \$30,000, that was the occasion for my footnoting at the bottom of Page 4, "The stipulation gives no explanation of the wide margin of difference between the allowance therefor to Schnack under the March 8 agreement and the \$90,000 at which it was carried in the Petitioner's books."

Mr. Janin: I think we should have footnoted our stipulation of facts on that to show that the \$90,000 good-will had not been carried on the partnership books as having any cost.

The Court: I assume that as so.

Mr. Janin: The subtraction of the \$90,000 from the \$120,000 leaves \$30,000 of assets which were actually [12] transferred to the petitioner corporation.

The Court: The point is that if it was there it was an asset, it had value. It would have something to do with what the corporation acquired from the partnership, whichever partnership it was acquired from.

I think maybe it would be better to let you go ahead with your statement here and I will try and reserve any queries that I have until later because if there are any things I have not given proper weight and attention to, why, naturally I want them pointed out to me.

Mr. Janin: Commencing at the bottom of Page 8 of the Findings of Fact and Opinion there is a discussion concerning the transfer to the petitioner corporation and which discloses that Leffel's account

showed a balance of \$17,000 (odd) and Ballentyne's account showed a balance of \$11,000 (odd), consisting both of capital and undrawn profits of the partnership at January 1, 1940.

Then the Findings of Fact and Opinion go on to state "the record is silent as to withdrawals by any of the three partners except for Schnack's withdrawal of \$8,000.00."

I took that, at the time of filing my Motion for Correction and Enlargement of the Findings of Fact, as a statement that there was no showing in the record of any withdrawals, and I think that I misinterpreted the Court on that, that that refers only to the year 1940 because the [13] stipulated facts do show the withdrawals prior to January 1, 1940 by all of the partners.

For example, it is shown that in general there were withdrawals of current earnings and the following year the earnings for the preceding year were fully drawn.

The Court: Yes. That is intended to be covered by my recitation and the reason I put in this footnote at the bottom of Page 4. That statement that was put in there, the accountant's statement disclosed much of that.

Mr. Janin: Then you went on to state:

"Inasmuch, however, as petitioner received only \$30,000 of the partnership assets, exclusive of goodwill, it would appear that withdrawals were made by Leffel and Ballentyne in unknown amounts and proportions."

I think, in that connection, we have to assume that

any withdrawals were made in proportion to their partnership interests.

Then you go on to say:

“There is no contention, however, that such withdrawals as were made were not in keeping with the prorata interests of the two individuals in the partnership as they originally existed, due effect being given to the withdrawal by Schnack of his interest.”

Then from that you conclude in the next paragraph:

“From the above we think it clear that it may not [14] be said that petitioner acquired substantially all of the assets of the Hawaiian Freight Association in exchange for its stock and accordingly it does not meet the test of Section 740(a)(1)(D), *supra*.” Then citing *E. T. Renfro Drug Company*.

Again, I do not think it is at all clear as to just what the basis of that determination is. I feel that the Court should make it clear just on what basis it is deciding that issue. It is not at all clear whether it would require all of the earnings of the partnership to remain intact for that partnership to qualify under Section 740(a)(1)(D), and I do not think there is any such requirement in the law.

In that connection I think the Court's use of the word “assets” is perhaps a material consideration. That is not the word used in the statute. The word in the statute is “properties.” I think the statute definitely contemplates it is the properties of a partnership which gave rise to its profits that are the assets which are to be transferred to the corporation in order for the corporation to avail itself of the

earnings experience of the partnership. That is exactly what was done here. All of the assets, which were productive of the partnership income, were transferred to the corporation.

The Court: The same was true in Renfro Drug.

Mr. Janin: Isn't there another consideration in [15] Renfro Drug? There we had not one partnership, but two partnerships. We had withdrawal by the active partners, rather than withdrawal by the silent partners, and a longer lapse of time before there was a transfer to the petitioner corporation. I do not think the case is on all four with the Renfro Drug case by any means, Your Honor.

The Court: Go ahead.

Mr. Janin: It is my feeling that the case was very much more similar to the case of—I can't think of the name at the moment.

The Court: Ranschoffs?

Mr. Janin: No. It was the Fageol Tool & Die Corporation case——

The Court: Yes.

Mr. Janin: ——wherein the Court held that it wasn't necessary that all of the assets of the partnership be transferred; that the statute had reference to the assets which produced the business and that the partners were entitled to withdraw earnings equivalent to salaries, and for payment of their income taxes, and that sort of thing. I do not think that decision, as a matter of fact, went as far as it should.

We have, for example, the provision made in the statute that it shall be assumed that all earnings

are distributed for the purposes of reconstructing the partnership net income. [16]

I do not think it is required that partnership earnings and capital, for the partner to qualify under Section 470(a)(1)(D) should continue to mount without any diminution or distribution of earnings.

We are looking at the partnership as though it were a corporation and I think, consequently, we can take into consideration that the normal progress of any business requires that some earnings be distributed.

The Court: I think you can forget the earnings proposition because I clearly wrote those out in my opinion on that. I do not have to decide that. I didn't need to here for this decision. So I think you can quit worrying about the earnings.

I didn't know what happened to the earnings. We know what the partnership interest was at January 1, 1940, and on the basis of that Dr. Schnack got \$8,000.00. We do know that there were \$27,000.00 of earnings between that time, but only \$30,000.00 went to the corporation. So I presume that maybe they distributed them. I don't know. Maybe it was prorated. I don't know.

So I really think you had better get back to your partnership interest. I wrote the earnings out.

Mr. Janin: I don't see, then, the basis for your conclusion that "it may not be said that the petitioner acquired substantially all of the assets of the Hawaiian [17] Freight Association in exchange for its stock."

What assets didn't they acquire?

The Court: They didn't acquire Dr. Schnack's partnership interest because he was paid off, bought out.

Mr. Janin: We start off with \$30,000.00 of capital on January 1, 1940 and \$30,000.00 of capital was transferred.

The Court: What do you mean "capital"?

Mr. Janin: I mean we start off with \$30,000.00 partnership assets on January 1, 1940 and that is the amount of assets which were transferred by the partnership to the corporation.

The Court: It doesn't make any difference about that, the same amount of assets. If you go out and buy some assets, they have got to be assets of the same outfit. Schnack was plainly out. He was bought out, the same as a partner was in Renfro Drug, and bought out for cash. In Renfro Drug they acquired all of the operating assets, but they paid him off in cash. We hold that that was not within Section 740(a)(1)(D) there and under that we hold that it is not under 740(a)(1)(D) here.

Schnack took his partnership interest out. The fact that the others acquired for cash his part, or he took down in cash his part, wouldn't make any difference.

There is a lot of difference between a distribution [18] of profits that you are talking about in your Fageol Tool, or the using of cash on hand to pay debts, because those debts are due and have to be paid anyhow. They are received subject to debts, if they are not paid before.

But here this company didn't acquire Schnack's interest.

Mr. Janin: What was Schnack's interest? It wasn't an interest in any specific assets of the partnership.

The Court: You tell me.

Mr. Janin: He was only interested as sort of a limited partner.

The Court: You tell me what his interest was.

Mr. Janin: That is what I am saying. The statute refers to it.

The Court: Schnack, according to the exhibits, had a capital interest.

Mr. Janin: That is perfectly true, he had a capital interest in the partnership. He has no interest in the partnership assets. That would be the case under California law.

The Court: He had the same interest as any other partner does.

Mr. Janin: But the statute refers to the partnership properties; not a transfer of the partnership interest held by each partner. [19]

The Court: That was the argument made in the Renfro case, the case presented by Renfro Drug.

Mr. Janin: I do not see that the Renfro case is at all in point here.

The Court: Go ahead.

Mr. Janin: As Your Honor pointed out earlier in this opinion the withdrawal of Dr. Schnack can be ignored.

The Court: It cannot be ignored.

Mr. Janin: That is the way I understand it.

The Court: That is one of the prime considerations in here because the partnership that this petitioner wants to be the successor of was a partnership of which Dr. Schnack was very much a part.

Mr. Janin: On Page 6 of the Opinion you have stated:

“The parties have devoted much of their briefs to arguments whether the withdrawal of Schnack effected a termination or dissolution of the partnership Hawaiian Freight Association or whether, as in this case, there being no provision in the partnership agreement specifically providing that the withdrawal of a partner should not terminate the partnership, the partnership did continue by operation of Hawaiian law with Leffel and Ballentyne as the partners during the period from March 8, the date of the agreement covering the withdrawal of Schnack, to April 30 when the [20] transfer of the business to petitioner was finally and fully completed.”

There is one misstatement in that paragraph. The correct date should be either March 31 or April 1, rather than April 30.

The Court: That is a typographical error.

Mr. Janin: You go on to say:

“It is not necessary in our opinion to take up and discuss the arguments so made since here the facts and the applicable provisions of the statute never permit us to reach a point where such arguments might be material. * * * Here there was no intention on the part of any one that the partnership should continue. The agreement in substance was that subject to Schnack’s withdrawal the petitioner would

be organized to take over the business and most, if not all, the remaining assets of the partnership, Hawaiian Freight Association.”

And then you point out:

“* * * that the necessary steps to move to petitioner the business and that part of the assets it did require began immediately, even though three weeks was required to complete all business already initiated.”

Then you further state:

“We have no occasion, therefore, to concern ourselves with the law of Hawaii as to the continuation of [21] the partnership after the withdrawal of a partner since for the purposes here we have no such case.”

The Court: That is right.

Mr. Janin: Then you cite the Ranschoffs decision.

The Court: We do not have any such case here, because here this whole thing, all of these steps were in one transaction and for one purpose, that was for Schnack to withdraw and the Hawaiian Freight Forwarders to acquire the business of the going partnership, which consisted of Leffel, Ballentyne and Schnack.

I didn't consider it necessary to discuss the law of Hawaii as to whether or not there might be a situation where, if there was a withdrawal of one partner, the partnership would continue, as in the case of Ranschoffs, because obviously these facts showed that that was not in the picture here at all. They didn't have any idea of continuing any business partnership with Leffel and Ballentyne.

Mr. Janin: For a period of time, but for the purpose of winding up.

The Court: It was all a move to carry the business of the Hawaiian Freight Forwarders, consisting of Ballentyne, Leffel and Schnack, to this corporation, with Schnack out, which is exactly the same thing as was true in the case of Renfro.

In Renfro Drug they were carrying the business of [22] the drug concern over to a corporation, with one of the partners out, being paid off, taking down his share. There wasn't any idea of any intervening operation. It was all a transitional operation.

In here somewhere there is provision which is made to show that that was the situation here, because I drew a line with respect to business in transit to show that there was no thought or idea of setting up any intervening partnership, and while I didn't find it necessary to go into it, and I do not know whether we have specifically ruled on it or not, but you would have then to meet the question as to whether or not, if you did have an intervening partnership—and it was argued in one of the briefs——

Mr. Janin: Right.

The Court: ——that this corporation could jump over the intervening partnership and get the benefit of the earnings record of the old partnership. So, for your own case, it is desirable that you have no intervening partnership, and when you have no intervening partnership, then you do not have this company acquiring the old partnership. They acquire less Schnack's interest, as in the Renfro Drug Company case.

Mr. Janin: I think, Your Honor——

The Court: I could have gone into a long extended discussion of that, but it seemed to me perfectly clear that that is the situation here, and that what I have said shows that [23] that is the situation.

Mr. Janin: I think, if Your Honor please, that your use of the word “assets” in here is very unfortunate and I think you are losing sight of the whole purpose of Section 740(a)(1)(D) which was that when a predecessor’s business was acquired by a corporation in a tax-free exchange under Section 112 (b)(5), and the operative properties of that predecessor business are transferred in that transaction, that the successor was entitled to compute its excess profits credit by reference to the earnings of the prior business. That is the broad purpose of Section 740(a)(1)(D), though there may be certain restrictions. I think the purpose for substantially all of the properties was very clear. It wasn’t the Congressional purpose to permit a split-up of a predecessor business and have half of the assets go to one corporation and half of the assets to go to another, and have both of the corporations entitled to utilize the earnings experience of the prior business. I think that is clearly the purpose of that restriction.

The Court: As I understand it, then, on your theory it wouldn’t make any difference who owned the business prior to the change-over, whether the ownership of the business changed or not.

Mr. Janin: I do not think that was really material from the Congressional standpoint, whether the ownership of the [24] business changed or not.

The Court: You don't have to have continuity of interest at all, and continuity of interest has nothing to do with it, and you think that Congress intended, just so there was an operating business unit here, regardless of ownership or interest, that if the business continued, though under different ownership, that it is entitled to go back and take over the earnings experience of the prior operation?

Mr. Janin: I think that was clearly the Congressional intent in this relief legislation.

The Court: If you think that is so, then the best thing I can say is that it would be a wholesome thing for you to take it on up and get the case on through the courts, because I think that Congress, and I think I have written it so as to show, that while Congress did intend that in certain instances it was going to expand the right to former earnings experience beyond corporations, that Congress did safeguard that expansion, and while it was some relief it said, "We will only grant it so far", and that Congress did clearly intend there was to be a continuity of interest there if they were going to have that right to earnings experience.

Of course, we so held in the Renfro Drug case that where it didn't go, as it had been before, but one person took down his share, even though the operating unit remained [25] the same, he was, so to speak, bought out by taking down his share in cash, that this was not coming within the statute that Congress had laid down.

Mr. Janin: I think, if Your Honor please——

The Court: Just a minute.

Now, in 112(b)(5) there is no requirement for a transfer of all of any group of assets. If assets are transferred by one or more to a corporation and there is, after the transfer, a comparable ownership, and it must be an ownership in substantially the same proportions as before the transfer, then it is a non-taxable exchange and it doesn't matter if it is a part of a block of assets. The important thing in Section 112(b)(5) is that the proportionate ownership must be the same before and afterward.

If that is all Congress wanted, why, it could have just said "112(b)(5) transaction thus and so", but Congress put down another provision. It said, and I grant you it says "substantially all properties", that is the way the statute reads, but it puts that requirement on and says it must be substantially all of the properties within a transaction within 112(b)(5).

Very obviously, this case does not meet that statutory test. 740 (a)(1)(D) adds something to 112(b)(5).

Now, while I am talking I will just offer a point on your remark about the writing of 112(b)(5) of this case. [26] You said you and Mr. McFarland had agreed, or thought you had agreed that that was not in this case. Well, that is a matter of law. 740 (a)(1)(D) has, as a part of it, and as a part of the law that has to be applied, Section 112(b)(5) and the Court must apply the law as it is written by Congress to the facts that it has before it. When you apply 740(a)(1)(D) and then you follow it through and see that by bringing into that a 112(b)(5) transaction you do have to have continuity of interest

after the transaction as before. In other words, you have to have ownership which is substantially in the same proportions.

You didn't have such ownership here because after it was over with only Leffel and Ballentyne owned the whole thing in proportions wholly out of line with the proportions in which the business or the properties, if you please, were owned before the transaction.

Now, the other part, about whether or not 112(b)(5) is in the case, I think there is this to be said on your behalf: that Mr. McFarland was not as definite and clear as he might have been in his opening statement and in the discussion that took place at the time the case was submitted as to how far he was going to argue, or how he was going to deal with 112(b)(5). Each time he would say, "We will deal with that on brief." At no time do I find, and did I find in there that he agreed that this was a 112(b)(5) transaction [27] because the remark was always hedged for dealing with it on brief and was, as I grant you, not too definite and clear a statement. But even so, the immediate question of law that this Court had to decide, we had to decide it as it was presented, and apply the law as we found it to the facts that were given and presented. So you cannot, when you look at it that way, find in this law a provision that there is no requirement that the ownership has to be in substantially the same proportions after the acquisition as it was before, because that is the essence of 112(b)(5) as it applies here. 112(b)(5) says that very distinctly and plainly.

So, when you look at it in that light then you have the Renfro Drug case which, when I wrote this case, we had outstanding, 112 TC 994, and a divided Court, not widely but a divided Court. I do not know whether there are any other cases that have gone up on it since or not, but I do know that Renfro Drug was affirmed in the Fifth Circuit, and took the same view that we have, that you do have to have a continuity of interest, and not only a continuity of interest but in the same proportions before as after.

So I am at a loss to see wherein there is anything that I could do, or should do with my report.

It looks to me that really what you have here is something where you just differ with the Court's view of the law as applied to the facts, and which we considered in a full [28] Court Conference in Renfro Drug, and that the most expeditious way would be to test the law.

You have all the facts that you have given me. It is a question of law. I found your facts as you stipulated them. I could not amplify on your stipulation of facts. You precluded me on that. You stipulated the facts and I said, "I am finding them as stipulated."

Mr. Janin: I think it is unfortunate, in connection with the stipulation of facts, we did not put in the exhibits in the prior proceeding. You tell me you are precluded from taking judicial notice of the record in the prior proceeding. This comes as a surprise to me. I do not pretend to know all the law, but I understood rather clearly that the Tax Court did take judicial notice of the record in other pro-

ceedings before it, particularly when the same parties were involved. Here we had a further coincidence of the same Judge and same counsel.

The Court: We were really given a going-over in the Funk case by the Third Circuit for that very thing. In that case, I will say, there is this difference—well, I don't know there is a difference.

Who were the parties in that case, the other case?

Mr. Janin: The Hawaiian Freight Association vs. the Commissioner of Internal Revenue.

The Court: It is a corporation case? [29]

Mr. Janin: A corporation case.

The Court: The prior one?

Mr. Janin: Yes.

The Court: What year?

Mr. Janin: The fiscal years 1940 and 1941.

As a matter of fact, I do not have anything in my record to show, but it may have been these exhibits were with the Court at the time our second hearing was had.

The Court: I wouldn't know because, as I say, I would not look at any record in another case since the Funk case has come down on judicial notice. I would, if the case were being heard before me, and the record was being made, I would certainly warn counsel I would not take judicial notice and it would be up to them to present it.

There is this difference, if that was the corporation case, the earlier case here: that in the Funk case the same subject matter was involved, but it was a different petition. In the earlier case it was the husband and in the second case it was the wife,

and the question of the taxability of the trust income was the question involved in exactly the same trust. Unfortunately, some matter that was in the earlier case appeared, some of the language, substantially has had been used in the other case. While there was no taking of judicial notice of the other case, the Third Circuit was of the view, and it was argued, that we had taken judicial notice of [30] it, and the Department of Justice noted the similarity of language and they assumed that we had too, and it was conceded that we had, and the Third Circuit, if you will pardon a plain, everyday country expression, "took hide and hair off" and sent it back and said, "Don't you do that. If you are going to do that, look into another record, it must be put in."

Mr. Janin: I would have preferred my record contain this additional exhibit which was an exhibit before the Court in that prior case, and does show the balance sheet as of December 31, 1939.

The Court: You have got that in this case. You have got your auditor's statement of December 31, 1939 in this case. It is in the record.

Mr. Janin: Is it?

The Court: Yes. Your auditor's report is in. That is set out pretty fully. Whether it is a complete balance sheet or not I do not know, but you have an auditor's report of the firm of Certified Public Accountants showing all of the matter that I have in the footnote at the bottom of Page 4. That is where it came from.

Mr. Janin: I think I made a mistake and got the one for 1940 in.

The Court: No, because in 1940 there was no partnership at the end of 1940. [31]

Mr. Janin: That is right.

The Court: Your auditor's report is in there.

Mr. Janin: In my copy of the transcript of the record the reference to the auditor's report is for 1940.

The Court: I don't know about that. I know what was before me because that is where the matter came from that I referred to at the bottom of Page 4.

As I say, I do not think you covered yourself with glory in working up your stipulation of facts. I didn't want to deal unfairly in my determination of the facts, for the purposes of decision, and that is the reason I put in the footnotes that I did, which would show that I had to give my own interpretation of those facts in setting up my basis for applying the law. But all of that comes from your stipulation of facts.

Mr. Janin: Your Honor, it seems rather frivolous to argue this further in view of the position which you have taken on it. I must say, however, that I think that the reason for your conclusion in this opinion is very ambiguously expressed. I am certain that I did not get the reason which you have expressed here this afternoon.

For example, when you state that the receipt by Leffel and Ballentyne on a 50-50 basis of the shares of stock of the petitioner doesn't qualify under Section 112(b)(5) as a tax-free transfer, it seems to me it was running definitely [32] counter to our stipulation of facts which was that after Schnack's with-

drawal Ballentyne and Leffel were equal partners, each owning 50 per cent interest in the partnership.

The Court: That is the reason that I said what I did, with reference to the part you referred to, on Page 6: that what happened here was an acquisition of a business, that it was a partnership of Schnack, Leffel and Ballentyne, and that was acquired under 740(a)(1)(D), and it had to be not only under 740(a)(1)(D), and to get that it likewise had to be a 112(b)(5) transaction, and you couldn't have a 112(b)(5) transaction under 740(a)(1)(D) which took over the going partnership that we have here, namely, the one that you look to for earnings experience, the partnership of Schnack, Leffel and Ballentyne. If you go into that gap that you are talking about, then, you lose yourself. You do not have the same partnership.

Mr. Janin: I think I understand the basis of your decision now, but I certainly didn't before. I am wondering whether it is going to be apparent to the Circuit Court of Appeals, because it seems to me that it is a direct reversal of the Ranschoffs case, and you have now expressed yourself. In other words, you are saying that Ranschoffs was erroneously decided and did not have any change in the ownership of the partnership.

The Court: Not at all. There you did have an [33] intervening partnership. Here the fact of the parties themselves, the transaction they made up, was an acquisition by Hawaiian Freight Forwarders of a three-way partnership. Ownership there was purely transitional. They even inserted provisions in there

about the profits from the business in transit. So they didn't have any intervening partnership like in the Ransehoffs case. You don't have a Ransehoffs case here. You have something else that is different from that. You have Renfro here.

Mr. Janin: I respectfully disagree with your conclusion, but I think I understand your views and that my remedy is clear, that it is on appeal to the Circuit Court, rather than further argument here.

The Court: Well, I regret that what I have said on Page 6, which seems to me to say in much fewer words exactly what I have said here, doesn't convey that to you. The truth is, I prepared an opinion, did it in an elementary way, and took those steps to show that here the parties themselves had no intention of any intervening partnership. It is purely transitional. They were changing from a three-way partnership to the Hawaiian Freight Forwarders and they had to have a little time to work it out. That was all there was to that. It was sort of a spoon-feeding operation, and so elementary, and it turns out to be like it was belabored. I don't see how this could be misunderstood as being that. [34] That, of course, I regret because I always have tried to take pride in the fact that even though I know I go wrong once in awhile on the law, because the Appellate Court tells me so, that they have never had any difficulty knowing what I said in my declaration of law and in my analysis or preliminary statement of facts for the purpose of applying the law. Apparently you had a different view. I am frank to say that I cannot help but feel that part of your

difficulty is that you, from reading your briefs, got yourself completely bogged down in some Hawaiian law that is of no moment for this case, and whether there was an intervening partnership, I think you were treading on very dangerous ground there because you then would be faced with a query as to whether or not, if you did have that intervening partnership there, and you were wrong on your Hawaiian law, you didn't have a Ransehoffs case, you would never get back to this partnership at all. But it seems to me that the facts of this case so completely by-pass that problem that I felt sure that this statement on Page 7 conveyed that message. I am sorry for your sake it didn't.

I trust that the Court of Appeal will understand the basis on which it is decided so that when they do decide the case they will give some beneficial declaration on the law in that light and not on a case that is wholly different from the one that I decided, which would not be helpful to [35] us in settling the law.

Do you have anything further you want to add?

Mr. Janin: I do not think I have anything further.

The Court: Mr. Mather?

Opening Statement on Behalf of the Respondent
By Mr. Mather

Mr. Mather: If Your Honor please, there seems to be very little I can say in the matter, but I would like to mention just a couple of things.

I think there are two motions here. One is for

correction and enlargement of findings of fact. The opinion states:

“The facts have been stipulated and as stipulated are so found.”

So I think that disposes of that motion.

The Court: I would so rule because that is a form that has been established and followed and, so far as I know, the Ninth Circuit is completely in accord.

I might say—you both may be familiar with it—back in years past we did have a case or two where the facts were stipulated, a complete stipulation, no evidence other than stipulation of facts.

One of our Judges—I think it was way back in the days when were called the Board of Tax Appeals—proceeded to set up separate findings of fact as his own findings [36] of fact and he didn't want to quote everything in the findings of fact. The case went up on appeal—I do not remember whether it was more than once—but the Circuit sent that case back to us and said, “All of the facts are stipulated. The record shows all the facts were stipulated. You have no basis for making findings of fact because the facts are stipulated, agreed on by the parties, and that is not your function. It is for you to apply the law to those facts.”

So we are pretty careful although once in awhile one does slip because of the quantity of cases we handle. But we are careful to heed the admonition of the court on that sort of case.

Mr. Mather: In connection with the other motion, a Motion for Reconsideration, one of the ques-

tions raised is "that said proceeding is decided upon an issue not presented to the Court."

I think the issue was clearly presented to the Court. As I gather from Mr. Janin's remarks, he says that the issue with respect to 112(b)(5) wasn't presented to the Court.

I find in Respondent's brief, filed with the Court, the statement:

"The requirement of Section 112(b)(5) has not been met for it cannot be said that the petitioner, by virtue of the exchange on or about March 19, 1940, acquired substantially [37] all the properties of the Hawaiian Freight Forwarders Association."

So clearly, it seems to me, that issue was before the Court.

There is one place in the opinion that I want to point out. I think it goes along with what Your Honor has already said with respect to Page 6, but on Page 7, beginning with the first paragraph, that is about the middle of the page on this mimeographed opinion, it is stated:

"Our question accordingly is whether or not petitioner did acquire within the meaning of Section 740(a)(1)(D) substantially all of the properties of Hawaiian Freight Association, the partnership which was organized on January 2, 1937."

That is the partnership that we are interested in, and not the partnership—if it is a partnership—that existed after the termination of the three-member partnership because if that is so, why, immediately you don't qualify as an acquiring corporation because you have got the intervening partnership.

I do not think there is anything further I can add to this. It seems to me the case was properly decided. In our brief we specifically relied upon the Renfro case, and it seems to me that this is very similar to that case. The Ranschoffs case emanated from this locality and is, it [38] seems to me, clearly distinguished from the Renfro case.

Mr. Janin: I would like to point out one thing that has resulted in this case, as a consequence of the ruling that Section 112(b)(5) was not met. We then have the situation where the excess profits credit is determined upon 8 per cent of the cost basis of capital transferred from the predecessor partnership to the petitioner corporation. I think that that is an inadequate standard. I think, for example, in the general classification of good-will, which included the permit from the Interstate Commerce Commission, there was a very substantial value transferred to the petitioner corporation. I think that, if the ruling is to hold, there should be some opportunity to present evidence on that score.

The Court: Was that in issue?

Mr. Janin: There was no issue raised. That is, I don't find that issue raised as to Section 112(b)(5), not in the opening statement before the Court.

The Court: You cannot escape 112(b)(5). It is a part of 740(a)(1)(D).

Mr. Janin: Section 740(a)(1)(D) refers to Section 112(b)(5). In other words, the business must be taxed for each transfer.

The Court: I think that what I said at the beginning, or the middle of Page 7 is sound, namely:

“Our question accordingly is whether or not petitioner did acquire within the meaning of Section 740(a)(1)(D) substantially all of the properties of Hawaiian Freight Association, the partnership which was organized on January 2, 1937, and which continued to the time when the agreements and understandings were reached under which the withdrawal of Schnack and his interests therein and the acquisition by petitioner of the partnership business and most, if not all, of the remaining assets were effected. If the transaction in question is to meet the requirements of the statute, it is necessary—first, that pursuant to the provisions of Section 740(a)(1)(D) petitioner did acquire substantially all of the properties of that partnership and, second, that the acquisition was in an exchange to which Section 112(b)(5) of the Code was applicable. To be within section 112(b)(5) the exchange must have been solely for stock or securities of petitioner, the acquiring corporation, and after the exchange the persons making the exchange must have been in control of petitioner and not only that but the stock received by each such person must have been substantially in the same proportion as his interest in the property prior to the exchange.”

Now, I think you have to face that because Section 112(b)(5) is an inseparable part of the law. That is, you cannot have a question under 740(a)(1)(D) that doesn't [40] include 112(b)(5). I think you obviously have to conclude that Congress had that in mind, that you would have to have your continuity of interest and that the stock had to be sub-

stantially in the same proportion, his interest in the property prior to the exchange. Now, that couldn't be true certainly as to the partnership of Schnack, Leffel and Ballentyne because——

Mr. Janin: Aren't you begging the question when you are talking about——

The Court: Wait until I get through.

That couldn't be true there because, very clearly, Schnack was out and Ballentyne, one of Leffel and Ballentyne, came out with a proportion equal to the other, which he didn't have previously. So even they were out of gear as far as ratios were concerned. And, as the Fifth Circuit pointed out, if you go into the interval, in the transition, then the petitioner there, as to the statute, is on the horns of a dilemma because if he argues that then it does him no good. He gets all earnings history. If he argues the other, then, having handled the transaction in the way it was, and since there wasn't a continuity of interest that 740(a)(1)(D), through the application of 112(b)(5), requires it just doesn't meet what Congress had in mind, because Congress says that it be that. So you have to have that kind of continuity of interest. [41]

Well, I just hope that this is presented in such a way that we will get some further step toward settling the law.

Mr. Janin: That is all we want.

The Court: I do think that this case, as we regard it, is clearly within *Renfro*. I do not think that the fact that Schnack might have been a silent

partner, if that is what the other record does show, would cure the defect as to the application of the statute as compared with Renfro.

I think the interests of all parties will be speeded if we deny these motions and let you present the matter to the Court of Appeal, and if they think I am wrong, or they do not understand me and they want me to make it clearer—I hope they understand me—why, then, of course, I will be glad to try my hand at it again.

Mr. Janin: Thank you.

The Court: So, on the first motion, with respect to the findings of fact, of course, that will be denied because I do not feel that I could do anything to the findings of fact in light of the fact that they are stipulated. That is what I have found.

On the question of the application of the law, whether we have satisfied any one as to what is the correct application of the law, we do understand now and the reason therefor, and since what we have done here is in keeping [42] with our conclusions as to the law, the motion on that will be denied also.

(Whereupon, at 3:55 o'clock p.m., the hearing in the above-entitled matter was concluded.)

[Endorsed]: Filed November 20, 1950.

PETITIONER'S EXHIBIT No. 3

Territory of Hawaii
Treasury Department, Honolulu

It is hereby certified that the attached is a true and exact copy of: The Statement of Co-Partnership of Hawaiian Freight Association filed and recorded in this office on February 20, 1937.

In witness whereof, I have hereunto set my hand and affixed the seal of the Treasury Department, Territory of Hawaii, this 12th day of April, 1949.

[Seal] /s/ WILLIAM B. BROWN,
Treasurer, Territory of Hawaii.

Act 98, Session Laws, 1917, Section 3410. Statements. Whenever any two or more persons shall carry on business in this Territory in co-partnership, it shall be incumbent on such persons to file, within thirty days after the commencement of such business, and thereafter annually, not later than March 1, in the office of the Treasurer, on blanks to be furnished by the Treasurer, a statement of:

(Statement of co-partnership as follows: Fee for recording, .50 for each name.)

Act 98, Session Laws, 1917, Section 3412. Statements to be published. All such statements as are required to be made in the preceding sections, except those required to be filed annually, shall also be published by the members of each co-partnership at least twice in the English language, in any newspaper of general circulation published in each county and city and county where said co-partnership has a place for the transaction of business.

Petitioner's Exhibit No. 3—(Continued)

Revised Laws of Hawaii, 1915, Section 3415. Penalty for noncompliance. The members of every co-partnership who shall neglect or fail to comply with the provisions of this chapter, shall severally and individually be liable for all the debts and liabilities of such co-partnership and may be severally sued therefor, without the necessity of joining the other members of the co-partnership, in any action or suit, and shall also severally be liable upon conviction to a penalty not exceeding five dollars for each and every day while such default shall continue.

STATEMENT OF CO-PARTNERSHIP

Of Hawaiian Freight Association, City and County of Honolulu, T. H., January 2, 1937.

To the Treasurer of the Territory of Hawaii,
Honolulu, T. H.

Sir:

This Is To Certify that on the Second day of January, 1937, the undersigned entered into and formed a general partnership, and herewith submit for filing in your office in compliance with law, the following statement:

1. The names and residences of each of the members of said co-partnership are:

J. C. Leffel, Chicago, Illinois.

G. C. Ballentyne, Honolulu, T. H.

A. G. Schnack, Honolulu, T. H.

2. The nature of the business of said co-partnership is to maintain and carry on a Freight Forwarding Business.

3. The firm name of said co-partnership is Hawaiian Freight Association.

Petitioner's Exhibit No. 3—(Continued)

4. The place of business of said co-partnership is at Honolulu, T. H., 238 Dillingham Bldg., in the District of Honolulu, City and County of Honolulu, Territory of Hawaii.

Witness our hands, this 16th day of Feb., A.D. 1937.

/s/ J. C. LEFFEL,

/s/ G. C. BALLENTYNE,

/s/ A. G. SCHNACK,

Territory of Hawaii—ss.

On this 16 day of Feb., 1937, before me personally appeared G. C. Ballentyne and A. G. Schnack, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] /s/ J. SCHNACK,

Notary Public, First Judicial Circuit, Territory of Hawaii.

February 1st, 1937

I Nathan Hillman, Notary Public for the State of Illinois, County of Cook, do hereby state that J. C. Leffel before me personally appeared on the 1st day of February 1937, and executed the foregoing instrument attached hereto, and acknowledged that he executed the same, as his own free act and deed.

[Seal] /s/ NATHAN HILLMAN,

Notary Public.

[Stamp]: Paid Feb. 20, 1937, Treasurer's Office, Territory of Hawaii.

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 4

Territory of Hawaii
Treasury Department, Honolulu

It is hereby certified that the attached is a true and exact copy of: The Statement of Dissolution of the Co-Partnership of Hawaiian Freight Association filed and recorded in this office on July 2, 1940.

In witness whereof, I have hereunto set my hand and affixed the seal of the Treasury Department, Territory of Hawaii, this 12th day of April, 1949.

[Seal] /s/ WILLIAM B. BROWN,
Treasurer, Territory of Hawaii.

Section 6862, Revised Laws of 1935. Statements of changes or dissolution. Whenever any change shall take place in the constitution of any such firm by the death or withdrawal of any member thereof, or by the addition of any member thereto, or by the dissolution thereof, a statement of such change or dissolution shall also be filed in the said office of the treasurer, on blanks to be furnished by the treasurer, within thirty days from such change, death or dissolution, and acknowledged before a notary public in the manner provided by law for the acknowledgment of deeds, as the case may be.

(Statement of dissolution as follows: Recording fee, .50 for each name.)

Section 6863. Revised Laws of 1935. Statements to be published. All such statements as are required to be made in the preceding sections, except those required to be filed annually, shall also be published

Petitioner's Exhibit No. 4—(Continued)

by the members of each co-partnership at least twice in the English language, in any newspaper of general circulation published in each county and city and county where said co-partnership has a place for the transaction of business.

Section 6866. Revised Laws of 1935. Penalty for non-compliance. The members of every co-partnership who shall neglect or fail to comply with the provisions of this chapter, shall severally and individually be liable for all the debts and liabilities of such co-partnership and may be severally sued therefor, without the necessity of joining the other members of the co-partnership, in any action or suit, and shall also severally be liable upon conviction to a penalty not exceeding five dollars for each and every day while such default shall continue.

STATEMENT OF DISSOLUTION OF THE
CO-PARTNERSHIP

Of Hawaiian Freight Association, City and County
of Honolulu, T. H., June 26th, 1940.

To the Treasurer of the Territory of Hawaii,
Honolulu, T. H.

Sir:

This Is To Certify, That on the 14th day of March, 1940, the Co-partnership firm of Hawaiian Freight Association, maintaining and carrying on a freight forwarding business at Dillingham building, in the district of Honolulu, City and County of Honolulu,

Petitioner's Exhibit No. 4—(Continued)
Territory of Hawaii, was dissolved by mutual consent, and in compliance with law, the following statement is herewith filed.

That the Partners of the said Co-partnership firm at the date of dissolution were:

J. C. Leffel, residing at Chicago, Illinois.

G. C. Ballentyne, residing at 2512 Ferdinand St.
A. G. Schnack, residing at Dowsett Tract.

Witness our hands this 26th day of June, A.D. 1940.

/s/ A. G. SCHNACK,

/s/ G. C. BALLENTYNE

Territory of Hawaii,
Honolulu, Oahu—ss.

On this 26th day of June, 1940, before me personally appeared A. G. Schnack and G. C. Ballentyne, both of Honolulu, Territory of Hawaii, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] /s/ JOHN EFFINGER,

Notary Public, First Judicial Circuit, Territory of Hawaii.

[Stamp]: Paid Jul 2 1940 Treasurer's Office, Territory of Hawaii.

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 5

Territory of Hawaii
Treasury Department, Honolulu

I, H. H. Adams, First Deputy Treasurer of the Territory of Hawaii, do hereby certify that according to the records of the Territorial Treasurer's Office, Hawaiian Freight Association was a general co-partnership organized on January 2, 1937 by J. C. Leffel, G. C. Ballentyne and A. G. Schnack, and was registered in the Treasurer's Office on February 20, 1937; that a statement of dissolution of the co-partnership on March 14, 1940 was registered in the Treasurer's Office on July 2, 1940; that no other statement of change in the co-partnership was registered; and that no statement of a new co-partnership between J. C. Leffel and G. C. Ballentyne under the style name Hawaiian Freight Association was registered in the Treasurer's Office between January 1, 1940 and April 30, 1940.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Treasurer's Office, at Honolulu, Territory of Hawaii, this 26th day of April, A. D. 1949.

[Seal] /s/ H. H. ADAMS,
First Deputy Treasurer,
Territory of Hawaii.

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 7

Calendar year 1941, fiscal years ended in 1942.

(Taxpayer's Name) Hawaiian Freight Forwarders, Limited

Fiscal Year Ended November 30, 1941

SCHEDULE No. 2-B

EXCESS PROFITS CREDIT BASED ON INCOME

Base Period Net Income—Gen. Average		Additions	
Excess profits net income:	Per Return	(Deductions)	Corrected
Year ended 3-31-37.....	\$ 3,829.92	\$ 5,285.15	\$ 9,115.07
Year ended 3-31-38.....	28,898.06	(3,058.54)	25,839.52
Year ended 3-31-39.....	16,327.84	(1,112.19)	15,215.65
Year ended 3-31-40.....	11,996.17	14,887.63	26,883.80
Totals.....	\$61,051.99	\$16,002.05	\$77,054.04
Net aggregate	\$61,051.99	\$16,002.05	\$77,054.04
Average base period net income.....	\$15,262.99	.....	\$19,238.51
Base Period Net Income—			
Increased Earnings in Last Half			
Net aggregate, last half of period....	.....	.....	\$42,099.45
Net aggregate, first half of period..	.....	.....	34,954.59
Excess, last half over first half.....	.....	.....	\$ 7,144.86
50% of such excess.....	.....	.....	\$ 3,572.43
Add: Net aggregate for last half....	.....	.....	42,099.45
Totals.....	.....	.....	\$45,671.88
Average base period net income:			
Based on above totals.....	.....	.....	\$22,835.94
Limited to e.p. net income for....	.....	.....
Excess Profits Credit			
95% of avge. base period net income			
Add: 8% of net capital addition....	.....	.....	\$21,694.14
Less: 6% of net capital reduction			
Excess profits credit.....	.....	.....	\$21,694.14

(parenthesis preceding the text on the adjusted lines.)

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 8

Name: Hawaiian Freight Forwarders, Ltd.

Schedule 6

Year ended 11-30-42

EXCESS PROFITS CREDIT—BASED ON INCOME
COMPUTATION—INCREASED INCOME METHOD

1. Excess profits net income, year 1939.....	\$15,215.65	
2. Excess profits net income, year 1940.....	26,883.80	
3. *Excess profits net income year.....		
4. Aggregate—last half of base period.....		\$42,099.45
5. Excess profits net income, year 1937.....	9,115.07	
6. Excess profits net income, year 1938.....	25,839.52	
7. Excess profits net income, year.....		
8. Aggregate—first half of base period.....		34,954.59
9. Excess of aggregate of last half over aggregate of first half		7,144.86
10. One-half of excess		3,572.43
11. Aggregate of last half.....		42,099.45
12. Total of lines 10 and 11.....		43,671.88
13. Line 12 divided by number of months in second half, multiplied by twelve		22,835.94
14. Highest excess profits net income for any taxable year— base period		26,883.80
15. Average base period income, line 13 or 14, whichever is lesser		22,835.94

COMPUTATION—EXCESS PROFITS CREDIT

16. 95 percent of line 15 or of amount computed under general average method, whichever is greater.....	\$21,694.14
17. Net capital addition or net capital reduction....\$	
18. 8 percent of line 17, if a net capital addition (or 6 percent if a net capital reduction)	
19. Excess profits credit—based on income—(line 16 plus (or minus) line 18)	\$21,694.14

* If taxable year ended after May 31, 1940, insert amount computed under section 713(f) (7).

T.C.U.S. Admitted in Evidence May 13, 1949.

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THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
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[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of The United States, do hereby certify that the foregoing documents, 1 to 54, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before The Tax Court of The United States in the above entitled proceeding and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of The United States, at Washington, in the District of Columbia, this 1st day of June, 1951.

[Seal] /s/ VICTOR S. MERSCH,
 Clerk, The Tax Court of the
 United States.

[Endorsed]: No. 12965. United States Court of Appeals for the Ninth Circuit. Hawaiian Freight Forwarders, Ltd., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 9, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12965

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STIPULATION RE EXCESS PROFITS TAX
RETURNS FILED BY PETITIONER

It Is Hereby Stipulated by and between the parties that the petitioner on review may file an Amended Designation of Contents of Record to be Printed in substantially the form of the Amended Designation attached hereto. This stipulation is made in order to simplify the printed record by eliminating therefrom all immaterial portions of the record and all portions the materiality of which can be covered

in substance by the following two facts which the parties hereby stipulate to be true:

1. All excess profits tax returns filed by petitioner on review for the taxable years ending November 30, 1940, November 30, 1941, November 30, 1942, November 30, 1943, November 30, 1944, and November 30, 1945, computed petitioner's excess profits credit by reference to the earnings experience of Hawaiian Freight Association.

2. Both the original and the amended partnership return of income for 1940 (Respondent's Exhibits D and E, respectively) covered in a single return, the period from January 1, 1940 to March 31, 1940, and listed J. C. Leffel, G. C. Ballentyne and A. G. Schnack as partners.

It is the purpose and intention of the parties that the portions of the record which the attached amended designation would eliminate from the printed record be available for this Court's examination, if this Court considers them material to any facts in addition to those covered in this stipulation.

Dated July 2, 1951.

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

Counsel for Petitioner on
Review.

/s/ THERON LAMAR CAUDLE,

Assistant Attorney General,
Counsel for Respondent on
Review.

AMENDED DESIGNATION OF CONTENTS
OF RECORD TO BE PRINTED AND ADOPTION
OF ASSIGNMENTS OF ERROR AS
STATEMENT OF POINTS

Now comes the petitioner on review, by and through its counsel, Louis Janin and Harold E. Haven, and designates the following as the record to be included in the printed transcript, to wit:

The entire typewritten record as transmitted from the Tax Court of the United States, except for the following:

(a) Petitioner's Exhibit 6, which is page 14 of said record.

(b) Petitioner's Exhibit 7, which is page 15 of said record, except for page 11 of said Exhibit 7, which page petitioner designates to be printed.

(c) Petitioner's Exhibit 8, which is page 16 of said record, except for page 12 of said Exhibit 8, which page petitioner designates to be printed.

(d) Respondent's Exhibits C through Q, both inclusive, (which are pages 17 through 31, both inclusive, of said record) except for the last page of Respondent's E, which page petitioner designates to be printed.

(e) All briefs filed in said Tax Court of the United States, which briefs are pages 32, 33 and 34 of said record.

(f) Motion for correction and enlargement of findings of fact, which is page 37 of said record.

(g) Motion for reconsideration, which is page 38 of said record.

(h) Motion for hearing, which is page 39 of said record.

(i) Computation for entry of decision, which is page 40 of said record.

(j) Notice under Rule 50, which is page 41 of said record.

(k) Motion to defer action on Rule 50 computation, which is page 42 of said record.

(l) Order, which is page 47 of said record.

(m) Notice, which is page 48 of said record.

(n) Untitled agreement with Rule 50 computation, which is page 49 of said record.

Petitioner on review by and through said counsel hereby adopts as the points upon which it intends to rely in support of its petition for review, the assignments of error contained in the petition for review.

Dated: July 2, 1951.

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

Counsel for Petitioner on
Review.

[Endorsed]: Filed July 20, 1951. Paul P. O'Brien,
Clerk.

No. 12,965

IN THE

United States Court of Appeals
For the Ninth Circuit

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

OPENING BRIEF OF PETITIONER.

LOUIS JANIN,

HAROLD E. HAVEN,

MELVIN H. MORGAN,

1105 Mills Tower, San Francisco 4, California,

Counsel for Petitioner.

FILED

NOV - 6 1951

PAUL P. O'BRIEN
CLERK

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No. 12,965

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

OPENING BRIEF OF PETITIONER.

JURISDICTIONAL STATEMENT.

The statutory provisions upon which the jurisdiction of the Tax Court of the United States and of this Court is based are Sections 272, 729, 1141 and 1142 of the *Internal Revenue Code*; 26 U.S.C. Sections 272, 729, 1141 and 1142.

Petitioner filed its tax returns for all years here involved with the Collector of Internal Revenue for the District of Hawaii at Honolulu, T. H. (Tr. 6). A notice of deficiency (Tr. 11) was mailed to petitioner at Honolulu, T. H. (Tr. 13) on February 2, 1948, and the petition therefrom (Tr. 6) was filed with the Tax Court on June 14, 1948.

The pleadings on which this action is founded are the petition of Hawaiian Freight Forwarders, Ltd. (Tr. 6), and the answer of the Commissioner of Internal Revenue (Tr. 24). The Tax Court entered its Findings of fact and Opinion on July 31, 1950 (Tr. 43) and on February 7, 1951, entered its decision (Tr. 57) that there was a deficiency in excess profits tax for the fiscal year ending November 30, 1943, of \$21,424.70, and for the fiscal year ending November 30, 1944 of \$7,403.23.

Petitioner on May 4, 1951, filed in the Tax Court its petition for review by this Court (Tr. 58).

CONCISE STATEMENT OF THE CASE.

The controversy involves petitioner's liability for excess profits taxes, specifically the proper method to be followed in the determination of its excess profits tax credit.

The primary question presented both here and in the Tax Court is whether petitioner may utilize the earnings experience of a predecessor partnership in determining its credit for excess profits tax purposes, or whether it is limited to the nominal credit on an invested capital basis.

Congress by Sections 740-744 of the Internal Revenue Code as amended by the Excess Profits Tax Amendments of 1941 and by the Revenue Act of 1942 enacted remedial legislation designed to avoid discrimination in excess profits taxes of certain corpora-

tions which had acquired the business and properties of predecessor corporations, partnerships, or sole proprietorships in tax free exchanges. Under these provisions ("Supplement A") petitioner would be entitled to use the earnings experience of a partnership if petitioner acquired substantially all of its properties for petitioner's stock in a tax free incorporation.

Petitioner was organized on March 13 or 14 of 1940 to acquire the business and properties of a predecessor partnership engaged in the freight forwarding business (Tr. 33-34). This partnership, Hawaiian Freight Association, had been organized in 1937 under the laws of the Territory of Hawaii with two active partners, J. C. Leffel and G. C. Ballentyne, and one inactive partner (Tr. 78), Dr. Schnack, with a total capital of approximately \$17,000 (Tr. 33-35). Schnack withdrew on March 8, 1940, being paid \$8,000 in cash from accumulated earnings for his nominal capital interest (10/67ths or approximately \$2,534.03) and his share of the undrawn profits.

The certificate required to be filed to effect the dissolution of a partnership under Hawaiian law was filed July 2, 1940, and stated that dissolution occurred March 14, 1940 (Tr. 122-124).

Under the agreement of withdrawal (Tr. 37-40) the two remaining partners were to (and did) continue the partnership pending the formation of petitioner and the transfers to it. They were then equal partners (Tr. 33). They made cash withdrawals of a portion of the earnings and transferred the freight

forwarding business, and all of the remaining assets (having an adjusted cost basis of \$30,000) to petitioner in exchange for its stock prorata to their interests (50-50) in the partnership (Tr. 33-34).

The respondent, in his notice of deficiency, determined that no gain or loss was recognized in this transfer (Tr. 16, 19, 22). He computed petitioner's credit for excess profits tax purposes on the invested capital method and on the basis of the cost of the assets to the partnership, adjusted for depreciation, and with no allowance for the value of good will transferred (valued on the petitioner's books at \$90,000 but having no cost basis to the partnership). He gave no explanation for his failure to follow the "Supplement A" computation on the earnings method followed by petitioner in its returns (Tr. 132-133) and by respondent's agents in certain prior Revenue Agent's reports (Tr. 126, 127).

The evidence presented to the Court consisted of a written stipulation of facts (with two exhibits attached) (Tr. 32, 37, 40), an oral stipulation (Tr. 78-79), six documentary exhibits filed by petitioner (Tr. 78) and sixteen documentary exhibits filed by respondent (Tr. 82). Counsel made opening statements explaining and limiting the issues presented. The case was argued on typewritten briefs.

In the Tax Court the respondent contended that petitioner was not entitled to the remedial benefits of Supplement A because the withdrawal of Dr. Schnack resulted (under Hawaiian law) in the termination

of one partnership and the creation of a new one (Tr. 37, 74) and that what petitioner acquired was the assets of the new partnership. He regarded as immaterial the fact that "the properties" in any event were the same (Tr. 74).

Petitioner's contentions were that the transaction fell both within the letter and spirit of the remedial legislation and that it had acquired substantially all of the properties of what (under Hawaiian law) was a continuing partnership, and in any event, those of the partnership whose earnings experience it sought to use (Tr. 71-73, 75).

The Tax Court concluded (emphasis supplied):

(1) It was unnecessary to determine the effect of Schnack's withdrawal on the continuity of the partnership under Hawaiian law or any other law because *there was no intent that the partnership continue* (Tr. 50).

(2) *Petitioner acquired the business and most if not all of the assets* (remaining after cash distributions which were less than the earnings of the partnership) (Tr. 51).

(3) *Petitioner did not acquire substantially all of the assets of Hawaiian Freight Association* (the partnership) in exchange for its stock (Tr. 53).

(4) *Due to the variance in interests between Leffel and Ballentyne,*¹ the receipt by them of the stock of

¹The conclusion is directly contrary to the stipulated facts.

petitioner on a 50-50 basis was not an exchange within Section 112(b)(5)² I.R.C. (Tr. 53).

(5) “The facts have been stipulated and as stipulated are so found”³ (Tr. 44).

Dependent on petitioner’s success on the primary question was and is a subsidiary issue; that is, whether petitioner was entitled to the retroactive application of the benefits of Sections 740-744 of the Internal Revenue Code as the same were amended by the Revenue Act of 1942. Stated differently, this question is whether petitioner’s excess profits credit for its fiscal years ending in 1942 and prior years is to be computed on the basis of the earnings of the predecessor partnership.

The determination of this subsidiary issue is dependent upon whether the petitioner in effect made a valid election to have the benefits of such amendments apply to it or whether the respondent is estopped to contend otherwise.

All of petitioner’s excess profits tax returns claimed excess profits credit on this basis (Tr. 132-133). It so claimed in a petition filed with the Tax Court applicable to its fiscal years ended in 1940 and 1941. Revenue Agents’ reports allowed this approach (Tr. 126, 127), but the Commissioner, without explanation, disallowed it in the notice of deficiency.

²This was not an issue before the Court in the view of counsel for either party, the Commissioner determined the transaction to be within Section 112(b)(5): his determination was *prima facie* correct and was accepted by petitioner.

³As noted above, in addition to the written stipulation, 26 exhibits were filed and an oral stipulation made.

Respondent contended below that petitioner was not entitled to compute its income on this basis even if successful on the main issue because it failed to use the magic words "Petitioner Elects" (Tr. 74, 75). Petitioner contended that it made a valid election, that the fact of its election was clear and that respondent, by his conduct and by reason of petitioner's reliance thereon, was estopped to contend otherwise (Tr. 73).

The Tax Court made no findings or determination with respect to this issue (Tr. 54).

After the entry of the Findings of Fact and Opinion the petitioner filed motions for correction and enlargement of the same and for reconsideration, and for a hearing on said motions (Tr. 4). The bases for these motions, briefly, were that the findings were inconsistent and incomplete, that the case was decided on issues neither presented nor argued, and that the Findings of Fact and Opinion were by a Division different than that to which the controversy was presented.

Hearing on these motions was had in San Francisco, November 1, 1950, before Division No. 8 (Judge Bolon B. Turner) and said motions were denied.

SPECIFICATIONS OF ERROR.

Petitioner specifies as error the following acts and omissions of the Tax Court of the United States:

1. The Court erred in assigning the controversy for determination to a Division of the Court other

than that to whom the controversy was presented, such action being without authority of law and contrary to the statutory provisions establishing the Court and providing for the manner of exercise of its functions.

2. The Court erred in having a Division other than that to whom the controversy was presented determine the same by Findings of Fact and Opinion, and decision pursuant thereto, such acts being without authority of law, contrary to the statutory provisions establishing the Court and providing for the manner of exercise of its functions.

3. The Court erred in failing and refusing to make written findings of fact as required by law.

4. The Tax Court erred in finding:

“Just when Schnack took down his share is not known * * *,”

the stipulation stating (Par. 4):

“The payment of the \$8,000 referred to therein was by check of the partnership drawn March 8, 1940.”

5. The Court erred in finding:

“Furthermore, due to the variance between the interests of Leffel and Ballentyne in the partnership it may not be said that the receipt by them on a 50-50 basis of the shares of the petitioner in exchange for the partnership assets represented a receipt by each of them of the said shares ‘substantially in proportion to his interest in the property prior to the exchange’ so as to

make the exchange an exchange to which section 112(b)(5) was applicable,”

and in failing and refusing to find, as stated in the stipulation (Par. 4):

“After the withdrawal of A. G. Schnack, Ballentyne and Leffel were equal partners in the business conducted by Hawaiian Freight Association.”

6. The Court erred in finding (Tr. 52):

“Except for Schnack’s withdrawal of \$8,000 * * * the record is silent as to withdrawals by any of the three partners.”

the stipulation (Par. 10) showing an annual record of the capital, earnings and withdrawals of each partner and particularly showing that the balance of the profits of each year was withdrawn in the next year.

7. The Court erred in finding that the understanding between Leffel, Ballentyne and Oahu Railway and Land Company amounted to an “arrangement” or an “agreement”, it being no more than a general understanding without legal force.

8. The Court erred in determining that “Schnack was not included in the plans for the new corporation”, his nonparticipation being purely voluntary on his part.

9. The Court erred in finding:

“Here there was no intention on the part of anyone that the partnership should continue,”

such finding being without evidentiary support and the stipulated facts clearly establishing that it did continue with Ballentyne and Leffel as equal partners from March 8, 1940 and until April 1, 1940, while petitioner was being organized and the transfers to it were being made.

10. The Court erred in failing and refusing to find that under the facts as stipulated and proved, and under the law of the Territory of Hawaii, the partnership, Hawaiian Freight Association was not terminated by Schnack's voluntary withdrawal, but continued for at least the brief period necessary to wind up its affairs, at least until April 1, 1940.

11. The Court erred in determining that the question of whether one partnership was terminated and a new partnership created by the withdrawal of Schnack could be answered without reference to the law of Hawaii, and in refusing to consider such law as applicable to the issue.

12. The Court erred in finding that petitioner did not acquire substantially all of the *assets* of Hawaiian Freight Association, and in failing and refusing to find that petitioner acquired substantially all of the *properties* of said predecessor partnership.

13. The Court erred in determining that the exchange by two equal partners (remaining after the withdrawal of Dr. Schnack) for petitioner's stock in equal amounts was not a tax-free exchange within the ambit of Section 112(b)(5).

14. The Court erred in failing and refusing to find and determine that the petitioner was entitled to the benefits of the optionally retroactive amendments to Supplement A provided by the Revenue Act of 1942.

15. The Court erred in failing and refusing to find and determine that the petitioner had made a valid election to have Supplement A as amended by the Revenue Act of 1942 applied retroactively.

16. The Court erred in failing and refusing to find and determine that the Commissioner was estopped to assert that a valid election for the retroactive application of Supplement A had not been made.

17. The Court erred in failing and refusing to find and determine that under the facts as stipulated and the evidence presented, the petitioner had made a *prima facie* case as to each and every issue involved in the proceeding, and that no contrary or contradictory evidence existed to refute such *prima facie* case.

18. If the Court did not err in determining that the partnership, Hawaiian Freight Association, was terminated by reason of Schnack's withdrawal, then the Court erred in failing and refusing to find and determine that the withdrawal of Schnack, the equalization of the interests of Leffel and Ballentyne, the organization of petitioner and the transfer of the partnership assets and business to petitioner were all parts of one transaction qualifying petitioner under Supplement A.

19. If the Court did not err in determining that the said partnership Hawaiian Freight Association was terminated on March 8, 1940, it erred in not determining that the respondent's regulation to the effect that a partnership cannot be an acquiring corporation was illegal and void as applied in this matter.

20. The Court erred in denying petitioner's motion for correction and enlargement of the Findings of Fact and Opinion, such denial being an abuse of discretion.

21. The Court erred in denying petitioner's motion for reconsideration, such denial being an abuse of discretion.

22. The Court erred in determining any deficiency against the petitioner for excess profits taxes for the years ended in 1943 and 1944.

SUMMARY OF ARGUMENT.

In the general scheme of excess profits taxes the basic Congressional purpose was to tax only abnormal profits due to the war. This usually was by reference to the taxpayer's earnings during the "normal period" 1936-1939. Relief was extended to corporations acquiring, tax free, the business and properties of predecessor organizations; the normal earnings of such acquired businesses could be used in determining what were not excess profits to the acquiring corporation.

On purely technical grounds of a minor change in membership of petitioner's predecessor partnership, immediately before petitioner's acquisition of its properties and business, respondent contended that this broad relief granted by Congress was not available to petitioner. Petitioner submits it is within the letter as well as within the spirit of the remedial legislation.

The Court below made no proper findings of the pertinent facts in controversy. In its opinion it distorted the facts as stipulated and as they appeared in uncontroverted documentary evidence. It assumed facts not in evidence but contrary thereto.

Certain issues were presented to the Court for its determination. The Court decided the controversy on issues never involved. Contrary to statute the controversy was decided, without excuse or reason, by a Division other than that to which presented.

In substance, the case as decided was on "facts" not presented, on "issues" not presented, and by a Division lacking jurisdiction. The ultimate determination on the merits was erroneous, petitioner being clearly entitled to the relief sought. A decision more clearly requiring reversal is difficult to imagine.

I. CONGRESS INTENDED, BY THE ENACTMENT OF "SUPPLEMENT A", TO ALLOW A CORPORATION IN PETITIONER'S POSITION TO USE THE EARNINGS EXPERIENCE OF ITS PREDECESSOR PARTNERSHIP.

The history and purpose of Supplement A demonstrate clearly its broad remedial purpose and that it was intended to benefit corporations such as petitioner.

The second revenue act of 1940 introduced an excess profits tax. The tax was levied on "adjusted excess profits net income", which was defined as "excess profits net income" minus the "excess profits credit" (with other adjustments not here material) (*I.R.C.* Sec. 710). The purpose of the "excess profits credit" was basically to allow a corporation its "normal" income free of excess profits tax. The determination of the excess profits credit could be made in either of two ways: (1) on the basis of its earnings during the base period, or (2) on the basis of a certain percentage of its invested capital. A corporation which was not in existence during the base period, having no base period earnings record, could determine its credit only by the invested capital method.

Some corporations, while technically not in existence during part or all of the base period, were essentially extensions of corporations which were in existence during the base period and were clearly equitably entitled to use the earnings experience of their predecessor; the business unit remained essentially the same. (If a business was carried on by a Nevada corporation during the base period and the state of

incorporation was changed to California at the beginning of the excess profits tax period—no other changes being made—the base period earnings of the Nevada corporation would certainly be a proper measure of the California corporation's "normal" earnings.) Supplement A (I.R.C. Secs. 740-744) therefore allowed certain corporations, which resulted from other corporations through certain tax free exchange, to use as their base period earnings experience the base period earnings experience of their predecessor corporation.

However, Supplement A as introduced in 1940, contained an obvious discrimination: It applied only where the taxpayer corporation acquired properties from a predecessor *corporation* (not a predecessor partnership or sole proprietorship). Obviously a business that was in existence during the base period in partnership form and was later incorporated could have a definite base period earnings experience by reference to which the "abnormal" profits of the successor corporation could be measured. Therefore, in 1941, *I.R.C.* Sec. 740(a)(1)(D) was enacted to include within the definition of an acquiring corporation (a corporation entitled to use the earnings experience of a predecessor, called a "component corporation") a corporation which grew out of a partnership or sole proprietorship.

The spirit in which *I.R.C.* Sec. 740(a)(1)(D) was enacted is demonstrated by the accompanying report of the House Ways and Means Committee (1941-1 *C.B.* pp. 550, 551, 552):

“In view of these compelling motives, the provisions of that Act lay a tax upon that portion of the earnings of corporations determined to be excess profits. The tax rates provided, or even higher rates, are thoroughly justified if the income subject thereto is clearly of the type intended to be reached. At the same time equitable considerations demand that every reasonable precaution be taken to prevent unfair application of the tax in abnormal cases. *The weight of the burden imposed carries with it a commensurate need for restricting its application to the cases for which it was designed.*”

* * * * *

“For these reasons, the present legislation attempts to provide, both by specific terms and in carefully guarded general terms, a set of flexible rules which should alleviate at least the bulk of the severe hardship cases which may arise. *The success or failure of legislation of this type depends, to a considerable degree, upon its intelligent and sympathetic administration.* Through its confidence in the experience and ability of the officials of the Treasury Department and the Bureau of Internal Revenue, your committee recommend the present flexible and broad legislation as the most satisfactory method of meeting the contingencies that will arise.

So that the relief afforded by the bill may be available for the entire period covered by the excess profits tax, the provisions of this legislation are made retroactive to apply to taxable years beginning after December 31, 1939.

The bill affords relief in the following situations:

* * * * *

6. Under Supplement A of existing law, corporations resulting from certain tax-free exchanges or reorganizations during or after the base period are permitted the use of their predecessor's earning experience in the computation of their excess profits credit based on income. The bill extends this privilege to corporations growing out of partnerships or sole proprietorships in tax-free exchanges during this same period. The resulting corporation would thus be allowed to use the earnings history of the predecessor partnership or sole proprietorship, after first converting such earnings to a corporate basis." (Emphasis added.)

Thus Congress enacted *I.R.C.* Sec. 740(a)(1)(D) as a relief provision, designed to insure that only abnormal profits (those of the type intended to be reached by an excess profits tax) be taxed at excess profits tax rates. The relief provisions were necessarily drafted in carefully guarded terms and depended for their success on intelligent and sympathetic administration.

If Ballentyne and Leffel (the two active and continuing partners in Hawaiian Freight Association) had not, shortly before the incorporation of petitioner, bought out the interest of Schnack (the inactive, or investor, partner who held less than a 15% interest), there could be no doubt that petitioner is entitled to use the earnings experience of Hawaiian Freight Association. The Tax Court has held that petitioner is deprived of that right for a reason not well expressed but apparently because the inactive, minor "investor" partner was a member of the part-

nership for most but not all of its life, and was not a shareholder in petitioner corporation; the Tax Court did not deny, as it could not deny, that petitioner, upon its incorporation, was the same business unit, with the same operating assets and income potential, as Hawaiian Freight Association.

We submit that any decision denying petitioner the benefits of the earnings experience of the partnership which was so clearly the same business unit as petitioner, completely ignores the intent of Congress as well as the nature and function of Supplement A. It does not give the 1941 extension of Supplement A the "intelligent and sympathetic administration" Congress intended such provision to receive.

II. PETITIONER COMES SQUARELY WITHIN THE STATUTORY DEFINITION OF AN ACQUIRING CORPORATION.

Petitioner was within the letter, as well as the spirit, of the definition of an acquiring corporation.

I. R. C. Sec. 740, in material part provides:

"Sec. 740. DEFINITIONS.

For the purposes of this Supplement—

(a) *Acquiring Corporation*.—The term "acquiring corporation" means—

(1) A corporation which has acquired—

* * * * *

(D) Substantially all the properties of a partnership in an exchange to which section 112(b) (5), or so much of section 112(c) or (e) as refers

to section 112(b)(5), or to which a corresponding provision of a prior revenue law, is or was applicable.”

There are thus three requirements:

1. The corporation must acquire substantially all of the properties.
2. It must acquire them from a partnership.
3. The exchange must be within *I.R.C.* Sec. 112(b)(5) either alone or as modified by Sec. 112(c) or (e).

We will deal with the first requirement, then the third and then the second, altering the order in order to dispose at the outset of the two requirements which can most easily be analyzed.

A. Petitioner acquired “substantially all of the properties” of Hawaiian Freight Association.

Perhaps the argument on this issue is unnecessary in view of the Court’s determination (Tr. 47) “the *petitioner* in exchange for its 6,000 shares of stock *received the going business of Hawaiian Freight Association and most, if not all, of its remaining assets.*” (Emphasis supplied.) If unnecessary, counsel for petitioner offer their apologies to this Court.

As is elsewhere discussed more fully in this brief, dispute on this issue between counsel for the parties was narrow and technical; they were agreed that petitioner acquired substantially all of the properties of the continuing business. The question was whether

those properties were acquired from a new partnership or from a continuing partnership.

The determination of the Court that "it may not be said that petitioner acquired substantially all of the assets of the Hawaiian Freight Association in exchange for its stock" is a compound, ambiguous, conclusion. Apparently, and despite the fact that the Court found it unnecessary to clearly determine whether the partnership terminated on Schnack's withdrawal (Tr. 49-50), it premised this conclusion, not on the *quantum* of assets, but on their source in a partnership or tenancy in common in which Dr. Schnack was not a member (Tr. 43-44; 47, 110). The absence of proper findings of fact has unquestionably added greatly to the burden of counsel herein and, more importantly, to the burden of this Court.

The following argument is not restricted to the Tax Court's determination, but is intended as a more complete presentation on the merits particularly on the possible question that a distribution of surplus cash earnings not used in or necessary for the operation of the business, would prevent petitioner's right to relief.

Throughout the existence of Hawaiian Freight Association the partners followed the practice of withdrawing only a portion of the profits in the year in which the profits were made, withdrawing the remainder of such profits in the following year (after the amount of profits had been determined or could

reasonably be estimated). (Stip. par. 10, Tr. 35, 36). The total capital of the partnership was \$16,984.12. Due to the time lag in withdrawal of profits the total capital plus accumulated earnings temporarily left in the partnership was as follows (Tr. 35):

Jan. 1, 1938 \$36,192.36 (includes \$16,984.12 capital)

Jan. 1, 1939 31,122.82 (includes \$16,984.12 capital)

Jan. 1, 1940 33,927.86 (includes \$16,984.12 capital)

The amount of accumulated earnings which a partner could withdraw was, of course, limited only by the capital required for the partnership's business. Generally, as noted above, slightly in excess of \$30,000 (total capital plus accumulated earnings) was on hand in the partnership at the close of each year.

On March 8, 1940, the partnership interest of Dr. Schnack, the inactive partner, was bought for \$8,000, payment being made from partnership funds. The \$8,000 payment to Schnack represented his capital as well as accumulated earnings. However, Ballentyne and Leffel, the continuing partners, left enough of their accumulated earnings in the partnership to make up for much more than Schnack's capital account. The partnership assets, exclusive of goodwill, which petitioner acquired exceeded by over \$13,000 the total capital of the partnership including Schnack's capital (Tr. 34, 35).

Ballentyne and Leffel also withdraw some of their accumulated earnings, as had been the custom throughout the existence of the partnership. But they

left in the partnership enough accumulated earnings so that petitioner could and did acquire from the partnership all the capital it needed for its operations (Stip. pars. 5 and 12, Tr. 34, 37).

On the above facts it was clearly erroneous for the Tax Court to conclude that petitioner did not acquire "substantially all of the assets⁴ of the Hawaiian Freight Association" (Tr. 53). The basis for this conclusion is not clearly stated in the opinion. Apparently the Tax Court's holding was based on the fact that the remaining partners bought out all of Dr. Schnack's 14.9% interest (Tr. 96-98). Possibly the Tax Court was concerned with the fact that the remaining partners bought out Schnack's capital account (\$2,534.03) as well as his accumulated earnings. (The Court was not concerned about the withdrawal of accumulated earnings. Tr. 96.)

But the partnership had no specific assets or properties which were peculiarly "Schnack's capital account". Such capital account was only a measure of Schnack's equitable ownership of a *quantum* of assets or properties held by the partnership. (The same properties were still in the partnership after Schnack withdrew and were still used in the business; only cash and undistributed earnings were reduced.) If Ballentyne and Leffel had the day before Schnack was bought out withdrawn \$8,000 of accumulated earnings and used that \$8,000 to buy out Schnack,

⁴The statute used the word "properties", which word as described *infra*, probably has a far more restricted meaning.

the fact that "capital" was left intact would be even easier to see. The actual method of buying out Schnack's interest had the same economic effect.

Clearly the withdrawal of profits from the partnership does not affect petitioner's standing as an acquiring corporation. If *I.R.C.* Section 740(a)(1)(D) required that earnings not be withdrawn from a partnership (even though retention was not necessary for business purposes) there would probably be not a single acquiring corporation which would be qualified within its meaning.

The Congressional intent behind the phrase "substantially all of the properties of a partnership" is not spelled out in any of the accompanying committee reports, or, so far as petitioner has been able to ascertain, in any reported case. However, the history of the successive versions of *I.R.C.* Section 740(a) gives some indication of the purpose and meaning of such phrase.

When the excess profits tax was first enacted in 1940 the House version of *I.R.C.* Sec. 740(a)(1)(A) used the words "substantially all of the *assets* of another corporation". The Senate changed the word "assets" to "properties" and also added *I.R.C.* Sec. 740(a)(1)(B) and (C). Section 740(a)(1)(D) was added in 1941, again using the phrase "substantially all the *properties*".

Two inferences seem reasonable: (1) "properties" is not the same as "assets", and (2) the phrase "sub-

stantially all the properties of another corporation” was taken from *I.R.C.* Sec. 112(g) where the same phrase is used. (This inference is very reasonable in view of the frequent references in the Committee Reports to the fact that Supplement A applies to certain *tax-free exchanges*).

The deliberate change in terms by the Senate cannot be ignored. If there is any difference in meaning (the Senate thought so and we submit that there is) the clearest example would be in the case of undivided profits held as surplus cash to the extent not used or required for the business. The cash would clearly be an asset, but not a portion of the “properties” of the business. The “properties” would be those assets which were used (including cash and accounts receivable) in the business to produce the undivided profits and surplus cash. Even if the transferor retained excess cash and earnings, the transfer would be of “substantially all the properties”.

Commissioner v. First National Bank of Altoona (C.C.A. 3, 1939), 104 F. (2d) 865, 870, 23 A.F.T.R. 119 (dismissed, 309 U.S. 691);
Western Industries Co. v. Helvering (C.A.D.C., 1936), 82 F. (2d) 461, 17 A.F.T.R. 656;

c.f.:

Pillar Rock Packing Co., v. Com'r. (C.C.A. 9, 1937), 90 F. (2d) 949, 19 A.F.T.R. 973.

In order to apply the case law on “substantially all the properties” in 112(g) to petitioner, the facts of this case must be analyzed as though Hawaiian

Freight Association were a corporation. On such analogy the facts would be these:

The "corporation" had a capital of \$16,984.12. It distributed part of its earnings in the year in which such earnings were made, and the other part of its earnings in the following year. In 1940 cash dividends were declared and the stock of a minority shareholder was redeemed, all with surplus cash earnings. This left the corporation a total of \$30,000 of assets, which assets included all of the corporation's operating properties plus enough cash to take care of its operating capital requirements. Such \$30,000 of assets were then acquired by another corporation.

It has been decided that under the above stated facts the second corporation would have acquired "substantially all the properties" from the first corporation, even though the first corporation itself *retained* the surplus assets not used in the business.

Commissioner v. First National Bank of Altoona, supra.

See also (to like effect):

John A. Nelson Co. v. Helvering (1935), 296 U.S. 374, 56 S. Ct. 273;

G. & K. Mfg. Co. v. Helvering (1935), 296 U.S. 389, 56 S. Ct. 276.

In view of the above case-defined meaning of the phrase "substantially all the properties of another corporation" it is clear that the phrase "substantially all the properties of a partnership" was intended to include the transfer made by Hawaiian Freight Asso-

ciation to petitioner. Petitioner acquired from Hawaiian Freight Association all of its operating properties, including accounts receivable, as well as its business and goodwill. Petitioner acquired a quantum of assets as great as that normally retained in the partnership. Petitioner acquired from Hawaiian Freight Association all the capital it needed for its operations. Petitioner therefore acquired "substantially all the properties" of Hawaiian Freight Association.

B. I.R.C. Section 112(b)(5) applied to the exchange by which petitioner acquired the properties of Hawaiian Freight Association.

Immediately prior to the formation of petitioner and the transfer of Hawaiian Freight Association's properties to petitioner, Ballentyne and Leffel were the sole and equal partners in Hawaiian Freight Association (Stip. par. 4, Tr. 33). Upon the incorporation of petitioner, Ballentyne and Leffel each owned fifty percent of petitioner's stock (Stip. par. 5, Tr. 33, 34). A clearer case of the applicability of *I.R.C.* Sec. 112(b)(5) would be hard to find. The Tax Court completely ignored the stipulated fact that Ballentyne and Leffel were equal partners after Schnack's withdrawal when it said:

"Furthermore, due to the variance between the interests of Leffel and Ballentyne in the partnership it may not be said that the receipt by them on a 50-50 basis of the shares of the petitioner in exchange for the partnership assets represented a receipt by each of them of the said shares 'substantially in proportion to his interest in the

property prior to the exchange' so as to make the exchange an exchange to which section 112(b)(5) was applicable." (Tr. 53.)

- C. **Despite the withdrawal of Dr. Schnack petitioner is entitled to use the earnings experience of Hawaiian Freight Association.**

The primary dispute in the Tax Court concerned the issue of whether the Hawaiian Freight Association was one partnership or two successive and different partnerships. Respondent's contention was essentially as follows:

When Dr. Schnack withdrew from Hawaiian Freight Association the partnership was dissolved and a new partnership was formed. Petitioner acquired the properties of the new partnership. By respondent's regulation a partnership cannot be an acquiring corporation. Since petitioner's only "component corporation" was, on this theory a partnership formed on March 8, 1940, petitioner was not constructively in existence on January 1, 1940 and therefore can not have an excess profits credit based on income.

In order to sustain this argument both of the following conclusions are necessary:

1. Schnack's withdrawal dissolved and terminated the partnership and resulted in a new partnership for the period required to form petitioner and complete the business in progress (22 days).

2. This technical change is sufficient to deprive the petitioner of the right to use the earnings experience of the partnership before dissolution.⁵

We shall now show that although respondent must win on both points to sustain his argument, he in fact can win on neither. The Tax Court did not clearly pass on this issue but held (1) contrary to the documentary fact, there was no intent to continue the partnership, and (2) there was no necessity to inquire into the continuity under Hawaiian law.

(1) Schnack's withdrawal did not dissolve the partnership and did not create a new partnership.

In determining whether Schnack's withdrawal dissolved the partnership we look first to the law of the territory under which the partnership was formed—the law of Hawaii. Compare *Cameron v. Commissioner*, 56 F. (2d) 1021 (C.C.A. 3, 1932) with *Carroll v. Commissioner*, 70 F. (2d) 806 (C.C.A. 5, 1934). The relevant Hawaiian statutes are set forth in Appendix A hereto.

The first point to be noted is that Hawaii in many respects accepts a partnership as an entity. It may be sued by firm name (Sec. 4048). Real and personal property taxes and a gross income tax are levied against partnerships in the firm name (Chapts. 61, 63 and 67).

⁵The retirement of Dr. Schnack, of course, had no effect on the basis of the partnership properties or the basis of the remaining partners' interests in the partnership. It did not result in gain or loss either to the partnership or to the continuing partners.

The second point is that the Hawaiian statutes clearly imply that a general partnership is *not ipso facto* dissolved by the withdrawal of a partner. In particular Sec. 6862 provides in part:

*“Statements of changes or dissolution. Whenever any change shall take place in the constitution of any firm by the death or withdrawal of any member thereof, or by the addition of any member thereto, or by the dissolution thereof, * * *.”* (Emphasis added).

This accords with the modern view that:

“By the general rule of law, death or withdrawal of a partner dissolves the partnership, but it is competent for the parties to provide otherwise.” (Emphasis added). *Robert E. Ford* (1946), 6 T.C. 499, 501. Acquiesced 1946-2 C.B.2.

The parties to the agreement whereby Schnack withdrew did provide that the partnership be not dissolved but continued. The agreement referred to Ballentyne and Leffel as “the remaining partners in the said co-partnership” (Tr. 39).

The closest case in point under the law of the Territory of Hawaii is *Lucas v. Lucas* (1911), 20 Hawaii, 433. In that case three brothers formed a partnership, one assigned his interest in the firm to a third party, and the third party was admitted by the other partners into the partnership. The Court quoted with approval, *Parsons on Partnership*, 4th Ed., Sec. 106:

“One who represents the interest of a former partner, if received by the other partners and

treated as a partner, becomes a partner under the original articles.”

Being a partner in the original partnership, the new member could obtain an accounting of profits earned prior to the assignment to her and her admission.

As stated in *Lindley on Partnerships*, 10th Ed., p. 681:

“Subject to a qualification which will be presently mentioned, a member of an ordinary firm can surrender his share and interest in the firm to his co-partners, or any of them, upon any terms to which he and they may all agree. But there is only one method by which a partner can retire from a firm without the consent of his co-partners, and that is, by dissolving the firm. In order to avoid the necessity of a general dissolution when a partner may wish to retire, special provisions are frequently introduced into partnership articles; but it is not infrequently found that, owing to unforeseen circumstances, these provisions cannot be carried into effect; and when that is the case, a dissolution, with its usual consequences, must take place if a partner is to retire otherwise than by the consent of his co-partner(s).”

See, also, pages 499-501; 679-680; 682-683.

The third point is that even independent of the intention of the parties not to dissolve, Hawaiian law prevented dissolution until the filing of a certificate (Sections 6862 and 6863), which certificate was not filed for the Hawaiian Freight Association partner-

ship until after petitioner was incorporated and had acquired the properties of its predecessor partnership (Exhibits 4 and 5, Tr. 122-125; Stipulation par. 5, Tr. 33, 34).

Under Hawaiian law Hawaiian Freight Association was therefore one partnership from its formation until after the completion of the transfer of its business and properties to petitioner.

Even in jurisdictions where by statute the withdrawal of a general partner dissolves a partnership (there being no such statute in Hawaii) a judicial exception may be made where the withdrawing partner is a minor and inactive partner (as was Dr. Schnack). For example, in California (the jurisdiction whose case law most strongly influences Hawaii), even after the adoption of the Uniform Partnership Act the State Supreme Court has held that the death of a minor (20% interest) inactive partner did not dissolve a partnership. *Zeibak v. Nasser* (1938), 12 Cal. (2d) 1, at 17, 18, 82 Pac. (2d) 375 at 383.

Federal tax cases also lead to the conclusion that there was no dissolution of Hawaiian Freight Association when Dr. Schnack withdrew. The absence of dissolution under state law may be conclusive. *Cameron v. Commissioner, supra*. Furthermore, there is a decided trend in federal tax cases toward the recognition of a partnership as a separate entity for tax purposes. If a partnership is recognized as a separate entity for tax purposes clearly the entity is preserved when the continuing partners express the in-

tention to preserve it by continuing the partnership (as did the continuing partners in Hawaiian Freight Association), and the partnership is not dissolved.

One manifestation of the trend toward the entity theory in partnership tax law has been the series of cases holding that the death of a partner does not end the fiscal year of the partnership when the surviving partners continue the business.

Commissioner v. Mnookin Estate (C.A. 8, 1950), 184 F. (2d) 89;

Girard Trust Company v. United States (C.A. 3, 1950), 182 F. (2d) 921;

Henderson's Estate v. Commissioner (C.C.A. 5, 1946), 155 F. (2d) 310.

Probably the best known result of the trend is the Commissioner's belated concession in *G.C.M.* 26379, 1950-1 C.B. 58 that the sale of a partnership interest is the sale of a capital asset. The Commissioner's concession came after he had lost numerous cases in which he argued that the sale of a partnership interest was not the sale of a capital asset because a partnership was not an entity separate and apart from its members (see, for example, *Daniel Gartling Estate* (1947), 6 T.C.M. 879, affirmed per curiam *Commissioner v. Estate of Gartling* (C.A. 9, 1948), 170 F. (2d) 73).

Even the last judicial stronghold of the "aggregate theory" (as opposed to the "entity theory") of the partnership in tax law—the United States Court of Appeals for the Second Circuit—has finally admitted

that, at least in some circumstances, the “entity theory” should be applied.

Goldberg’s Estate v. Commissioner (C.A. 2, 1951), 189 F. (2d) 634.

The Court’s recognition of the entity theory was expressed in a manner peculiarly appropriate to our case, when the Court said:

“Unlike a corporation, which for tax purposes is treated as an independent jural personality, the partnership has been recognized by Congress as both a business unit and as an association of individuals. In determining the applicability of a specific tax code section to transactions involving partnerships decision must be governed not by reference to general *a priori* formulas drawn from the common law nature of a partnership, but by reference to the Congressional purpose for which the particular section was enacted.” 189 F. (2d) at 635, 636.

In viewing the Congressional purpose for which Section 740(a)(1)(D) was enacted it is clear that the entity theory of the partnership must be applied (see pp. 14-18 *supra*).

Even respondent’s regulations recognize that the withdrawal of a partner which does not materially affect the operation of the partnership business or the basis of its assets may not dissolve, but merely “re-organize” a partnership. Section 29.113(a)(13)-2 of *Regulations 111* provides in part:

“*Readjustment of partnership interests.*—When a partner retires from a partnership, or a part-

nership is dissolved, the partner realizes a gain or loss measured by the difference between the price received for his interest and the sum of the adjusted cost or other basis to him of his interest in the partnership plus * * *.

If a new partner is admitted to the partnership, *or an existing partnership is reorganized*, the facts as to such change or reorganization should be fully set forth in the next return of income, in order that the Commissioner may determine whether any gain has been realized or loss sustained by any partner.”

Thus Hawaiian Freight Association was not dissolved by Schnack’s withdrawal. It was one and the same partnership both before and after such withdrawal.

Even if the partnership was dissolved, it was not terminated and a new partnership created. There was no intent to create a new partnership, but to continue the old one (Ex. A-1, Tr. 37-39). No certificate of a new partnership was filed as would have been required by Hawaiian law if a new partnership had been formed. The intent was to continue the old firm until the two remaining and equal partners had organized petitioner and conveyed the partnership business and properties to it. This was in accordance with an understanding⁶ previously reached (Stip. pars. 3, 4; Tr. 33).

⁶There is a great deal of difference in the legal meaning of “an understanding” resting on mutual advantage, as used in the stipulation of facts (Tr. 33) and “an agreement” or “an arrangement” as used by the Tax Court (Tr. 43, 45).

A distinction exists between termination and dissolution. The winding up process with its disposition of the assets occupies the intervening time between the two events.

See,

7 *Uniform Laws Annotated (Partnerships)*, p. 165.⁷

For the foregoing reasons it is submitted that the withdrawal of Dr. Schnack neither dissolved nor terminated the partnership in which he had been a minority and inactive member.

(2) Even if Dr. Schnack's withdrawal did cause a technical change in the partnership, petitioner is entitled to the benefits of Supplement A.

If this Court holds that Schnack's withdrawal did not terminate the partnership the following analysis is unnecessary to petitioner's case. If, however, this Court holds that such withdrawal did terminate the partnership it then becomes necessary to determine whether such change was a sufficient disruption of the partnership business to deprive petitioner of the earnings experience of the partnership prior to Schnack's withdrawal. We submit that Hawaiian Freight Association was so clearly one continuing business entity both before and after Schnack's withdrawal that petitioner is in any event entitled to use the total earnings experience of that one business

⁷The Commissioner's note clearly establishes that under all interpretations of common law there was a continuity of the partnership during the winding up period, at least for the purpose of suing and being sued.

entity from its organization on January 2, 1937, to its acquisition by petitioner in March, 1940.

In the first place, a technical dissolution of a partnership is now recognized as relatively ineffectual to bring about substantial changes in the tax treatment of a partnership. A technical dissolution by death or withdrawal will not (if the surviving partners continue the business as they did here) affect the partnership fiscal year as to the remaining partners (*Mary D. Walsh* (1946), 7 T. C. 205) or as to the deceased partner (*Comm'r v. Mnookin Estate* (C.A. 8, 1950), 184 F. (2d) 89); it will not affect the basis of the partnership assets (*Robert E. Ford* (1946), 6 T. C. 499); and it will not affect the holding period of a partnership interest (*Allan S. Lehman* (1946), 7 T.C. 1088, affirmed (C.A. 2, 1948), 165 Fed. (2d) 383). It should, therefore, not affect the right of a corporation to use the earnings experience of a predecessor partnership.

In the second place the history of the enactment of *I.R.C.* Sec. 740(a)(1)(D) (the section under which petitioner claims to qualify as an "acquiring corporation") demonstrates that its remedial intent extended to such a situation as herein presented, regardless of a technical and transitory change. As the Committee Reports to the enactment of *I.R.C.* Sec. 740(a)(1)(D) state:

"Under Supplement A of existing law, corporations resulting from certain tax-free exchanges or reorganizations during or after the base period are permitted the use of the predecessor's

earning experience in the computation of their excess profits credit based on income. *The bill extends this privilege to corporations growing out of partnerships or sole proprietorships in tax-free exchanges during this same period.*" (Emphasis added). (*Report of Committee on Ways and Means to Excess Profits Tax Amendments of 1941*, 1941-1 C.B. 550 at 552.)

As Mr. Cooper, in discussion from the floor of the House of Representatives, stated:

"In other words, this provision makes it possible for a corporation in the taxable year to secure the advantage of the experience that its predecessor in business may have had, even though that predecessor was not a corporation as is provided for in existing law, but was a partnership." Vol. 87, *Congressional Record*, page 1380.

As the Tax Court stated in *Ransohoff's Inc.* (1947), 9 T.C. 376 at page 382:

"There is no doubt that the petitioner corporation acquired and succeeded to the business organization of the Ransohoff partnership. We have held that the preceding partnership had a continuous existence. *The history of the earnings of that partnership, whether composed of Robert, James, and Howard, or of Robert and James, is a proper measure of the average base period net income of the petitioner for excess profits tax purposes.*" (Emphasis added).

The fact that the withdrawing partner was a minor inactive partner is important, not only as affects the

question as to whether there was a technical dissolution, but also as affects the materiality of a technical dissolution for the purposes of Supplement A. When an active partner *whose personal activities* are important to a partnership business, withdraws from a partnership a different business unit is in fact and substance created. If Ballentyne or Leffel (the two active partners) had withdrawn from Hawaiian Freight Association prior to the formation of petitioner a serious question might arise as to whether there was sufficient "continuity of business enterprise" to allow a successor corporation the earnings experience of the partnership prior to withdrawal. However, when the withdrawing partner is inactive and when his capital is retained in the business (by the continuing partners leaving in the business sufficient accumulated earnings) there is complete continuity of business entity.

The importance of continuity of business entity has been recognized, although not articulated, in prior Supplement A cases of predecessor partnerships or sole proprietorships. Where the asserted "component corporation" was the same business unit, taxpayers have been allowed the benefits of Supplement A.

Faigle Tool & Die Corp. (1946), 7 T.C. 236;

A. C. Burton & Co. v. C.I.R. (C.A. 5, 1951),
190 F. (2d) 115;

Ransohoff's, Inc. (1947), 9 T.C. 376 (a case where the continuity of business entity was less clear than in petitioner's case, but where

the Court was much influenced by the liberal and remedial intent of Supplement A).

Where, however, the managing active partner has withdrawn so as to create a different business entity the taxpayer was not allowed the benefit of Supplement A.

E. T. Renfro Drug Co. v. C.I.R. (C.A. 5, 1950),
183 F. (2d) 846.

The very idea that a corporation is deprived of its predecessor partnership's earnings experience solely because there was a minor change in partnership personnel is so far from the spirit of "Supplement A" that the proposition seems to have been considered not even worth mentioning except in a very few instances. For example, in *Vegetable Farms, Inc. v. C.I.R.*, 191 F. (2d), decided by this Court on Sept. 4, 1951, A, B, C, and D were partners in the vegetable growing business during the base period. On October 31, 1940, A and B bought out C and D. On November 8, 1940, A and B incorporated the business. The situation was identical with petitioner's situation⁸ and neither the examining agent nor the government counsel in either stage of the litigation nor the Tax Court Judge nor any of the Judges of this Court questioned the taxpayer's right to the earnings experience of the four-man predecessor part-

⁸Petitioner's right to the benefit of Supplement A is even stronger for in the *Vegetable Farms* case two partners withdrew (only one withdrew in petitioner's case) and in the *Vegetable Farms* case the withdrawing partners had rendered advisory services (while Dr. Schnack rendered none).

nership (the only argument being as to the amount of the Supplement A credit). We submit that petitioner's right to the benefit of Supplement A is similarly not open to questions.

III. PETITIONER IS ENTITLED TO THE RETROACTIVE APPLICATION OF SUPPLEMENT A TO TAXABLE YEARS BEGINNING BEFORE 1942.

This issue is subsidiary to the main issue discussed above. It affects the years in issue only in that it affects the amount of excess profits credit carry-over for years prior to petitioner's fiscal year ending on November 30, 1943.

Prior to the enactment of the Revenue Act of 1942 petitioner was not entitled to the benefits of Supplement A because the petitioner's "component corporation" (Hawaiian Freight Association, the partnership) was not in existence on January 1, 1936,⁹ the beginning of petitioner's base period. Section 228 of the *Revenue Act of 1942* eliminated this requirement.

Section 228(f) of the *Revenue Act of 1942* provided that certain amendments made by Section 228 (including the amendments relevant to this issue) should apply to taxable years beginning before December 31,

⁹Confusion as to the date of commencement of petitioner's base period and the existence of a component on that date is understandable in view of statutory changes and the complexity of the statutory language. Petitioner clearly believed that it did have a "qualified component" in existence on January 1, 1936 and could determine its excess profits credit on the earnings method.

1941, only if the taxpayer elected to have such amendments apply to such years. Petitioner submits that it complied with the spirit if not the letter of regulations relating to such election, and also that any failure of petitioner to comply with the letter of such regulations was induced by the conduct of respondent's agents.

The relevant statutes and regulations are set forth in Appendix B hereto. Section 30.742-2(e) of Regulations 109 required the electing taxpayer to file certain data, particularly:

- (1) A statement that it elects to have such amendments apply retroactively;
- (2) Certain data and computations for each of such years.¹⁰

Petitioner at all times believed that it was entitled to the benefits of Supplement A, even without the 1942 amendments. It filed all its excess profits tax returns (including a return before the 1942 act was passed) on the assumption that it was entitled to the earnings experience of its predecessor partnership. All of its returns contained the necessary data and information required by the regulations. All its returns indicated a clear intent to avail itself of Supplement A. The Commissioner now states, however, that petitioner is not entitled to the retroactive application of Supplement A for the taxable years begin-

¹⁰The data and computations required were the same as set forth on the several excess profits tax returns filed by petitioner for the respective years.

ning before 1942 because petitioner, believing the 1942 amendment not necessary to give it Supplement A benefits, did not perform the ritual of attaching a statement to its return announcing a formal election to have Supplement A apply retroactively.

Petitioner's conduct did not mislead the Commissioner in any way. Petitioner supplied the Commissioner with all relevant schedules and data for the computation of the Supplement A credit. Petitioner used Supplement A for taxable years beginning before 1942 in excess profits tax returns filed both before and after the enactment of the Revenue Act of 1942. Petitioner, after the Revenue Act of 1942, submitted in its Tax Court petition that it was entitled to the benefit of Supplement A for the fiscal years beginning in 1940 and 1941 (6 *T.C.M.* 601). Its disclosure was complete; its conduct bona fide. Its intention to use Supplement A retroactively was and is, we submit, clear to anyone with any understanding of the Internal Revenue Code (and certainly clear to the Commissioner).

Unfortunately the petitioner was not informed of the Commissioner's intention as clearly as the Commissioner was informed of the petitioner's intention. At a time when petitioner could probably still have filed in time the requisite formal statement of election¹¹ the Commissioner led petitioner to believe that

¹¹The probable interpretation of Sec. 30.742-2(e) of Regulations 109 as set forth in *T.D. 5242, 1943 C.B. 692* at 734 is that petitioner originally had until February 15, 1944 to file such statement. The

no such statement was necessary, by approving petitioner's use of Supplement A for fiscal years beginning in 1940 and 1941. Only when it was too late for petitioner to file a formal statement of election did the Commissioner (who with fine impartiality now champions form over substance) decide that the formal election statement is necessary.

We submit that since the Commissioner at all relevant times was supplied with all necessary information and abundantly clear evidence of intention to have Supplement A apply retroactively, petitioner is entitled to the retroactive application of Supplement A.

IV. NUMEROUS ERRORS BY THE TAX COURT REQUIRE ITS REVERSAL.

The errors committed by the Tax Court, other than the ultimate determination against petitioner, fall into four main classes:

A. The Court failed to make findings of fact as required by law;

B. The Court made factual statements contrary to the stipulated facts;

clear inference from *T.D. 5391* as amended by *T.D. 5400* (1944 C.B. 474, 476) is that the time for making the election provided by Section 30.472-2(e) of Regulations 109 was extended for a reasonable period after August 22, 1944 (the date of promulgation of *T.D. 5400*). However the Revenue Agent, under Report dated June 2, 1944 (Pet. Exs. 7 and 8, Tr. 126, 127) approved petitioner's use of Supplement A for 1941 and 1942 giving petitioner no clue that an additional statement had to be filed.

C. The Court's determination was essentially on "issues" not before it, and apparently predicated upon assumed "facts" not in evidence but contrary thereto;

D. The Court exceeded its jurisdiction in that the findings of fact and opinion were made by a Division different from that hearing the controversy.

These errors unquestionably had a cumulative effect on the ultimate determination of the Court, an effect more important than if the errors had all been of a single class.

A. The Court failed to make findings of fact as required by law.

The Tax Court is required to make written findings of fact. This is one, if not the most important, principal function of the Court.

I.R.C. Sec. 1117(b);

Diller v. Commissioner (C.A. 9, 1936), 91 F. (2d) 194;

Belridge Oil Co. v. Helvering (C.A. 9, 1934), 69 F. (2d) 432;

Levitt & Sons, Inc. v. Nunan (C.A. 2, 1944), 142 F. (2d) 795.

The case was presented to the Court, in part on a written stipulation of facts, but in part upon documentary exhibits and an oral stipulation. Respective counsel on brief presented proposed findings of fact, predicated in part on the stipulations and in part on the documentary exhibits.

The Court stated (Tr. 44):

“The facts have been stipulated and as stipulated are so found.”

This was the only finding made by the Court with respect to the evidence before it (Tr. 87). It was very careful not to make findings in its opinion (Tr. 87-88).

Counsel for the respective parties were in agreement as to the evidentiary facts; these were stipulated or admitted without objection. Counsel did not agree as to the following ultimate facts:

- (1) Whether the partnership was terminated by Schnack's withdrawal;
- (2) Whether a new partnership was then formed;
- (3) Whether petitioner had made an effective election or whether the respondent was estopped to otherwise contend;
- (4) Whether petitioner was an acquiring corporation.

These were the essential facts to be determined by the Court from the evidence submitted, documentary or stipulated. That is what the Court should have done in fulfillment of its essential function, and it is what the Court failed and refused to do.

B. The Court made factual statements contrary to the stipulated facts and other evidence.

Perhaps because the Court failed to make appropriate findings of fact, perhaps because it easily and

simply stated it found the facts as stipulated, perhaps for other reasons unknown to counsel, it in any event did make a number of factual misstatements. These were so material in nature that it cannot be assumed the same result would have been reached in the absence of such misstatements.

The parties stipulated that Schnack was paid on March 8, 1940 (Tr. 33, 39). The Court stated: "Just when Schnack took down his share is not known." (Tr. 50).

The agreement with Schnack referred to Leffel and Ballentyne as the remaining partners in the partnership and provided that future operations would be at their risk (Tr. 38-39). It was stipulated that thereafter Ballentyne and Leffel were equal partners in the business (Tr. 33). The Court stated: "Here there was no intention on the part of anyone that the partnership should continue." (Tr. 50).

The parties stipulated that an understanding had been reached for the formation of petitioner (Tr. 33). Without further evidence the Court made this "an arrangement and understanding" (Tr. 45, 46), "agreements and understandings" (Tr. 51) and in the official headnote (Tr. 43) it is called "an agreement."¹²

¹²An agreement was subsequently reached on July 12, 1940. See *Hawaiian Freight Forwarders, Ltd. v. Com'r*, 6 T.C.M. 601, in which the same issue as here presented was involved but not decided, and which counsel and the judge to whom the case was presented were also identical.

The parties stipulated that “after the withdrawal of A. G. Schnack, *Ballentyne and Leffel* were equal partners in the business conducted by Hawaiian Freight Association”. (Tr. 33). The Court stated (Tr. 53): “* * * due to the variance between the interests of *Leffel and Ballentyne*” their receipt of the stock of petitioner on a 50-50 basis was not substantially in proportion to their interests in the property prior to the exchange.

C. The Court's determination was essentially on “issues” not before it and apparently predicated upon assumed “facts” not in evidence but contrary thereto.

The Commissioner's determination is presumptively correct. The Commissioner determined that no gain or loss was recognized by the petitioner in the transfer of the properties of the predecessor partnership in exchange for its stock. Thus, in computing petitioner's excess profits credit on the invested capital basis, the original cost to the partnership (rather than fair market value at the time of transfer) was used as the cost of such stock (Tr. 16, 19). This was the amount transferred, exclusive of goodwill, which had cost the partnership nothing (Tr. 34).

The pleadings did not serve to fully define the issues in controversy, the respondent's answer being a general denial. The Commissioner having determined the transaction to be tax free, i.e., within the scope of Section 112(b)(5) of the Code no assignment of error appears with respect thereto in the petition. By the time the stipulation of facts was drawn, respective

counsel were agreed as to the points of controversy. This is reflected in the stipulation itself, particularly at paragraph 13 (Tr. 37):

“That portion of the foregoing stipulation which deals with the earnings of the Hawaiian Freight Association for the three months ended March 31, 1940, shall not be regarded as a concession on the part of respondent that only one partnership was in existence during the said period, it being the respondent’s position that the elimination of A. G. Schnack as a partner on March 8, 1940 terminated the existing partnership and resulted in the creation of a new partnership on that date.”

In the hearing before the Court (Division 9) respective counsel made opening statements defining the issues presented to the Court for its determination. In them there was not the slightest suggestion as to an issue under Section 112(b)(5) of the Code. Under the written stipulation of facts and the Commissioner’s determination Section 112(b)(5) was clearly applicable, so nothing was said about it.

Therefore the issues presented to and argued before the Court related to the continuity of the partnership from March 8 to April 1, the period required to wind up business in process, and the effect of such continuity on petitioner’s right to relief. If this was not a new partnership, petitioner was clearly entitled to prevail; less clearly if it was a new partnership. As an ancillary issue, in reality a different approach to the same issue, respondent contended that petitioner

did not acquire substantially all of the properties of the "old partnership" but instead, those of a new partnership.

Unquestionably the assets acquired by petitioner had a value greater than cost to the predecessor partnership. This was particularly true of goodwill, as indicated by the earnings of the partnership. Because the facts clearly precluded any argument that the transfer was not within the scope of Section 112(b) (5), petitioner could not and did not urge that it was. Otherwise, petitioner could have had a higher excess profits credit on the invested capital basis, i.e., 8% of the increase in the value of the assets transferred over original cost to the predecessor partnership.

Thus petitioner is in the position of having a case decided against it on a basis not presented or argued and with no opportunity to effect the tax saving inherent in the predicates of the decision. The stipulation of facts and other evidence and the argument thereon were entirely adequate to meet the issues actually in controversy, but not to meet the "facts" and "issues" as assumed by the Tax Court.

The function of an opening statement is to advise the Court of the salient facts and of the issues presented for its decision. The admissions and concessions frequently made therein, either directly or by implication, greatly minimize the work of the Court; they are not meaningless.

9 *Mertens, Federal Income Taxation*, 269-271,
and cases cited;

Com'r v. Lawrence Operating Company, 152 F. (2d) 938 (C.A. 2, 1945).

In part predicated upon failure to adhere to the stipulated facts and uncontroverted documentary exhibits, and in part predicated on distortion of such evidence the Court concluded (without clear and logical reasoning):

1. There was no intention on the part of anyone that the partnership should continue (Tr. 50);
2. It was therefore unnecessary to determine whether it did in fact or law continue (Tr. 49-51);
3. Petitioner did not acquire substantially all the assets of the partnership which commenced January 2, 1937 and which continued to the time "the agreements and understandings were reached" (Tr. 51, 53);
4. Due to the *variance* of the interests of Ballentyne and Leffel their receipt of the stock of petitioner on an equal basis was not in proportion to their interests in the partnership properties (Tr. 53).

As elsewhere discussed these conclusions are contrary to the agreed and incontrovertible facts and evidence. They do not answer the question: What was the effect of Schnack's withdrawal? i.e., (1) Was the partnership continued? (2) Was it dissolved and in the process of winding up; or (3) Was it terminated and a new partnership formed?

After the promulgation of the Tax Court's Findings of Fact and Opinion petitioner moved for the correction and enlargement of the Findings of Fact and also moved for reconsideration (Tr. 4). Both of such motions were denied (Tr. 5).

In substance what the Court did was not only to decide the controversy on issues not presented, but to fail to decide the essential issue which was presented. The case decided was never before it; the case before it was never decided.

D. The Court exceeded its jurisdiction in that the findings of fact and opinion were made by a division different from that hearing the controversy.

In addition to the substantive errors detailed above there was a procedural error in the trial of this case in the Tax Court: the case was heard by and argued before Judge Van Fossan (Division 9) and was then assigned to and decided by Judge Turner (Division 8) (Tr. 42). No reason was given for the transfer.

The Tax Court is a creature of statute. Its powers are defined in the statute. The statute provides:

I.R.C. Sec. 1103:

“(c) *Divisions.*—The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof.
* * *.”

I.R.C. Sec. 1118:

“(a) *Hearings, Determinations and Reports.*
—A division shall *hear, and make a determina-*

tion upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding." (Emphasis added.)

Thus there is authorization to divide the Tax Court into divisions. There is provision for a division to hear a case (as was done here, the division being Judge Van Fossan). There is also statutory authorization for the division that hears the case to decide it (as is done every day in the Tax Court). But there is no authorization for one division (here Division Nine) to hear, and for another division (here Division Eight) to determine a case, as was done here. Such procedure is not authorized by statute and is not necessary to implement any power authorized by statute. Such procedure is therefore not within the power of the Tax Court—a Court of limited jurisdiction and power.

A judicial exception to the above statutory provisions has been made allowing one Tax Court judge to decide a case heard by another judge in exceptional circumstances, namely when the judge who heard the evidence died or resigned before decision or when the term of the judge who heard the evidence expired before decision. There have been five such cases:

Foss v. Commissioner (C.C.A. 1, 1935), 75 F. (2d) 326 (Death);

Garden City Feeder Co. v. Commissioner (C.C.A. 8, 1935), 75 F. (2d) 804 (Death);

Davidson v. Commissioner (C.C.A. 5, 1937),
91 F. (2d) 516 (Resignation);

Seaside Improvement Co. v. Commissioner
(C.C.A. 2, 1939), 105 F. (2d) 990 (Resigna-
tion);

Halle v. Commissioner (C.A. 2, 1949), 175 F.
(2d) 500 (Expiration of term of office).

For present purposes it is sufficient to note that the exceptional circumstances involved in each of the above cases was not present in this case (Judge Van Fossan who heard the case remained an active member of the Tax Court). There is, therefore, no basis in the case law or otherwise for the procedure followed by the Tax Court in this case in direct violation of statute.

Petitioner prefers a decision on the merits to one on this point. Petitioner raises this procedural point because it is clear that as a practical matter petitioner's rights were impaired by the transfer of this case, after hearing, from Judge Van Fossan to Judge Turner. Judge Van Fossan had heard a prior case between the same parties involving petitioner's right to the benefit of Supplement A.¹³ He also heard this case. He was therefore familiar with the facts and issues which determine petitioner's right to Supplement A. It is therefore inconceivable that Judge Van Fossan could have decided this case on legal issues which counsel conceded were not involved, and on facts which were contrary to the stipulation.

¹³In 6 *T.C.M.* 601. Petitioner's right to the benefit of Supplement A was presented as an alternative issue—an issue that was never decided because petitioner prevailed on the main issue.

V. CONCLUSION.

For the above reasons it is submitted that the decision of the Tax Court was clearly erroneous and should be reversed with directions to enter a decision of no deficiency.

Dated, San Francisco, California,
November 5, 1951.

Respectfully submitted,

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MELVIN H. MORGAN,

Counsel for Petitioner.

(Appendices A and B Follow.)

Appendices A and B.



Appendix A

HAWAIIAN LAWS.

All references are to Revised Laws of Hawaii 1935—the most recent bound edition published at the time Dr. Schnack withdrew from Hawaiian Freight Association (March 1940).¹

Sec. 6862 [8604]

“Sec. 6862. *Statements of changes or dissolution.* Whenever any change shall take place in the constitution of any firm by the death or withdrawal of any member thereof, or by the addition of any member thereto, or by the dissolution thereof, a statement of the change or dissolution shall also be filed in the office of the treasurer, on blanks to be furnished by the treasurer, within thirty days from the change, death or dissolution, and acknowledged before a notary public in the manner provided by law for the acknowledgment of deeds, as the case may be.”

Sec. 6863 [8606]

“Sec. 6863. *Statements to be published.* All such statements as are required to be made in the preceding sections, except those required to be filed annually, shall also be published by the members of each copartnership at least twice in the English language, in any newspaper of general circulation published in each county and city

¹Bracketed section numbers are references to corresponding section of Revised Laws of Hawaii 1945.

and county where the copartnership has a place for the transaction of business.”

Sec. 6864 [8607]

“Sec. 6864. *Record of statements.* The treasurer shall cause a book to be kept in his office, in which shall be recorded the several particulars in this subtitle before required to be filed in his office; and the book shall be open for public inspection.”

Sec. 6866 [8609]

“Sec. 6866. *Personal liability and penalty.* The members of every copartnership who shall neglect or fail to comply with the provisions of this subtitle shall severally and individually be liable for all the debts and liabilities of the copartnership, and may be severally sued therefor, without the necessity of joining the other members of the copartnership, in any action or suit, and shall also severally forfeit to the Territory twenty-five dollars for each and every month while the default shall continue, to be recovered by action brought in the name of the Territory by the treasurer.” [as amended in 1937.]

Chapter 61, Administration and Real Property Tax.

Sec. 1925 [5142]

“Sec. 1925. *Assessment of property of corporations or co-partnerships.* Property of a corporation or co-partnership shall be assessed to it under its corporate or firm name.”

Chapter 63, Business Excise Tax.

Sec. 2000²

“Sec. 2000. *Excise tax.* There shall be levied and assessed each year upon each person doing business within the Territory, except as otherwise in this chapter provided, an excise tax in the manner and at the rate hereinafter provided, for the doing of business for the taxable year preceding the one in which the tax is regularly assessed. Such tax shall be in addition to any license or other fee prescribed by any other law.”

Sec. 2001²

“Sec. 2001. *Definitions.* Whenever used in this chapter . . .

‘Person’ shall include every individual, partnership . . .”

Chapter 67, Personal Property Tax.

Section 2107 [5637]

“Sec. 2107. *Assessment of property of corporations or copartnerships.* Property of a corporation or copartnership shall be assessed to it under its corporate or firm name.”

²No exactly corresponding section, but see sections 5442, 5455 of Revised Laws of Hawaii 1945.

Appendix B

FEDERAL TAX STATUTES AND REGULATIONS.

I.R.C. Sec. 112(b)(5)

“(5) Transfer to Corporation Controlled by Transferor. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under subsection (k) it is not to be considered as ‘other property or money’) shall be considered as stock or securities received by such transferor.”

I.R.C. Sec. 712. Excess Profits Credit—Allowance.

“(a) Domestic Corporations.—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or 714, whichever amount

results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. In the case of all other domestic corporations the excess profits credit for any taxable year shall be an amount computed under section 714. For allowance of excess profits credit in case of certain reorganizations of corporations, see section 741.”

I.R.C. Sec. 713. Excess Profits Credit—Based on Income.

* * * * *

I.R.C. Sec. 714. Excess Profits Credit—Based on Invested Capital.

* * * * *

I.R.C. Sec. 740. Definitions.

“For the purposes of this Supplement—

(a) **Acquiring Corporation.**—The term ‘acquiring corporation’ means—

(1) A corporation which has acquired—

(A) substantially all the properties of another corporation and the whole or a part of the consideration for the transfer of such properties is the transfer to such other corporation of all the stock of all classes (except qualifying shares) of the corporation which has acquired such properties, or

(B) substantially all the properties of another corporation and the sole consideration for the transfer of such properties is the transfer to such other corporation of voting stock of the corporation which has acquired such properties, or

(C) before October 1, 1940, properties of another corporation solely as paid-in surplus or a contribution to capital in respect of voting stock owned by such other corporation, or

(D) substantially all the properties of a partnership in an exchange to which section 112(b)(5), or so much of section 112(c) or (e) as refers to section 112(b)(5), or to which a corresponding provision of a prior revenue law, is or was applicable.

* * * * *

(b) Component Corporation.—The term 'component corporation' means—

(1) In the case of a transaction described in subsection (a)(1), the corporation which transferred the assets;

(2) In the case of a transaction described in subsection (a)(2), the corporation the property of which was acquired;

(3) In the case of a statutory merger, all corporations merged, except the corporation resulting from the merger; or

(4) In the case of a statutory consolidation, all corporations consolidated, except the corporation resulting from the consolidation; or

(5) In the case of a transaction specified in subsection (a)(1)(D), the partnership whose properties were acquired.

* * * * *

(d) In the case of a taxpayer which is an acquiring corporation the base period shall be the four calendar years 1936 to 1939, both inclusive,

except that, if the taxpayer became an acquiring corporation prior to September 1, 1940, the base period shall be the same as that applicable to its first taxable year ending in 1941.

(e) **Base Period Years.**—In the case of a taxpayer which is an acquiring corporation its base period years shall be the four successive twelve-month periods beginning on the same date as the beginning of its base period.

(f)¹ **Existence of Acquiring Corporation.**—For the purposes of subsection (c) and section 741, if any component corporation was in existence on the date of the beginning of the taxpayer's base period (either actually or by reason of this subsection), its acquiring corporation shall be considered to have been in existence on such date.

(f)² **Existence of Acquiring Corporation.**—For the purposes of Section 712(a), if any component corporation of the taxpayer was in existence before January 1, 1940, the taxpayer shall be considered to have been in existence before such date.

(g) **Component Corporations of Component Corporations.**—If a corporation is a component corporation of an acquiring corporation, under subsection (b) or under this subsection, it shall (except for the purposes of section 742(d)(1) and (2) and section 743(a)(1), and (3)) also be a component corporation of the corporation of which such acquiring corporation is a component corporation.”

¹Before amendment by Sec. 228 of the Revenue Act of 1942.

²After amendment by Sec. 228 of the Revenue Act of 1942.

I.R.C. Sec. 742. Supplement A Average Base Period Net Income.

“In the case of a taxpayer which is an acquiring corporation, its average base period net income (for the purpose of the credit computed under section 713) shall be the amount computed under section 713 or the amount of its Supplement A average base period net income, whichever is the greater.

* * * * *

(g) In the case of a partnership which is a component corporation by virtue of section 740(b) (5), the computations required by this Supplement shall be made, under rules and regulations prescribed by the Commissioner with the approval of the Secretary, as if such partnership had been a corporation. For the purpose of such computations, in making the adjustment for income taxes required by section 711(b)(1)(A), the partnership so regarded as a corporation shall be considered as having distributed all its net income as a dividend.”

Revenue Act of 1942, Sec. 228:

“(f) Taxable Years to Which Amendments Applicable.—The amendments made by this section shall be applicable only to the computation of the tax for taxable years beginning after December 31, 1941, except that (1) the last sentence of section 740(c), as added by subsection (a) of this section shall be applicable to the computation of the tax for all taxable years beginning after December 31, 1939, and (2) if a taxpayer, within the time and in the manner and subject to such

regulations as the Commissioner with the approval of the Secretary prescribes, elects to have such amendments (except those which by their terms are limited to taxable years beginning after December 31, 1941, and except that referred to in clause (1)) apply retroactively to all taxable years of the taxpayer beginning after December 31, 1939, such amendments shall also be applicable to the computation of the tax for taxable years beginning after December 31, 1939.”

Regulations 112, Sec. 35.740-4

“* * * a partnership (or a business owned by a sole proprietorship) cannot be an acquiring corporation. * * *”

Regulations 109, Sec. 30.742-2(e) as amended by T.D. 5242, 1943 C.B. 692 at 734:

“(e) *Election to have amendments to Supplement A made by Revenue Act of 1942 apply to taxable years beginning after December 31, 1939, and before January 1, 1942.*—A taxpayer may elect to have the amendments to Supplement A made by the Revenue Act of 1942 apply retroactively (with the exceptions indicated below) to all its taxable years beginning after December 31, 1939, and before January 1, 1942. If a taxpayer elects to have such amendments so apply, each such amendment shall be applicable to such taxable years, except such of the amendments as by their terms are limited to taxable years beginning after December 31, 1941. The election does not apply to the last sentence of section 740(c), as added by the Revenue Act of 1942, or to the repeal of section 741(b), which amend-

ments by their terms are retroactive to all taxable years beginning after December 31, 1939. The amendments which by their terms are limited to taxable years beginning after December 31, 1941, and therefore are also not subject to the election are the provisions of section 740(c) (except the last sentence thereof) and section 742(b)(2).

“If the taxpayer desires to make the election described in the preceding paragraph, the election must be made on or before whichever one of the following applicable dates occurs first:

(1) June 15, 1943, if an excess profits tax return for a taxable year beginning after December 31, 1941, is filed for such year, and if such return is filed on or before June 15, 1943,

(2) the date of the filing of the taxpayer's excess profits tax return for its first taxable year beginning after December 31, 1941, for which an excess profits tax return is filed if such return is filed after June 15, 1943, or

(3) the date of expiration of 30 months after the filing of the excess profits tax return (or, if no such return was filed, after the date on which such return was due or would have been due if such return were required to be filed) for the taxpayer's first taxable year beginning after December 31, 1939.

The election once made shall be irrevocable and shall apply to all taxable years of the taxpayer beginning before January 1, 1942.

In order to make such election, the taxpayer shall, within the time prescribed, file with the collector the following:

(i) A statement that the taxpayer elects to have such amendments apply to each of the taxable years beginning after December 31, 1939, and before January 1, 1942; and

(ii) A statement with respect to each such taxable year setting forth (A) the Supplement A average base period net income for such taxable year, computed under Supplement A as amended by such amendments, (B) the excess profits credit for such year based upon the Supplement A average base period net income for such year so computed, and (C) the excess profits tax or unused excess profits credit (as defined in section 710(c)(2)), if any, as the case may be, for such year resulting from the use of the excess profits credit so computed. Such statement shall not constitute a claim for credit or refund. If the application of the amendments made by the Revenue Act of 1942 results in an overpayment in the amount of tax for any taxable year, a timely claim for credit or refund on Form 843 should be filed in the usual manner. For limitations upon credits and refunds generally, see section 322."

T. D. 5391 as amended by *T. D. 5400*, 1944 C. B. 474, 476.

"Subpart IV—Miscellaneous Provisions.

Extension of time for making certain elections.—If in these regulations a time is fixed on or before which an election or application for relief may be made by the taxpayer and such time is not expressly provided in the law, the Commissioner in his discretion may, for good cause

shown, except as provided in the next paragraph, grant a reasonable extension of time for the making of such election or application if request for such extension is filed with the Commissioner prior to the time fixed for making such election or application or within such time thereafter as the Commissioner may consider reasonable under the circumstances and it is shown to the satisfaction of the Commissioner that the granting of the extension will not jeopardize the interests of the Government.

“The time fixed in these regulations will not be extended by the Commissioner in such cases as the following: (a) an election required to be made in or with the taxpayer’s original income or excess profits tax return; (b) an election required to be exercised by the filing of a claim for credit or refund unless such election is required to be exercised at a time fixed by these regulations, which time is before the date of the expiration of the period of limitations provided in section 322, or an election required to be filed in a petition to the Tax Court; or (c) an application for permission to change a previous election.

Regulations * * * 109

“*Par. 4.* The above amendments to Regulations * * * 112, which regulations are applicable to taxable years beginning after December 31, 1941, are hereby made applicable to any taxable year beginning * * * after December 31, 1939, and prior to January 1, 1942, which is covered by Regulations 109. (T.D. 5391, July 14, 1944, as amended by T.D. 5400, Aug. 22, 1944.)”

In the United States Court of Appeals
for the Ninth Circuit

HAWAIIAN FREIGHT FORWARDERS, LTD., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Review of the Decision of the Tax Court of the
United States

BRIEF FOR THE RESPONDENT

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FILED

DEC 12 1951

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In the United States Court of Appeals for the Ninth Circuit

No. 12965

HAWAIIAN FREIGHT FORWARDERS, LTD., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Review of the Decision of the Tax Court of the
United States

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 43-54) are reported at 15 T. C. 35.

JURISDICTION

The Commissioner determined deficiencies in excess profits tax against taxpayer in the amount of \$21,424.70 for the fiscal year ended November 30, 1943, and in the amount of \$7,403.23 for the fiscal year ended November 30, 1944. (R. 44.) Notice of the deficiencies was mailed to taxpayer on February 2, 1948. (R. 11-24.) On June 14, 1948, within the permitted 90-day period, taxpayer filed a petition for review with the Tax Court

for a redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code. (R. 3, 6-24.) The Commissioner filed an answer (R. 24-25) and a hearing was held on May 13, 1949 (R. 70-83). After rendition of the opinion of the Tax Court a hearing was held on motions filed by taxpayer. (R. 83-118.) The decision of the Tax Court was entered February 7, 1951. (R. 57.) Petition for review by this Court was filed on May 4, 1951. (R. 58-67.) This Court accordingly has jurisdiction of the case under the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether taxpayer was an "acquiring corporation" as defined in Section 740 (a)(1)(D) of the Internal Revenue Code, of the Leffel-Ballentyne-Schnack partnership which was in existence before January 1, 1940, so as to be entitled to compute its excess profits credit by the income method for the taxable years ended November 30, 1943, and November 30, 1944.

2. If taxpayer was an "acquiring corporation" as to the Leffel-Ballentyne-Schnack partnership, whether taxpayer made an election, as required by Section 228 (f) of the Revenue Act of 1942 and the pertinent Treasury Regulations, so as to be entitled to compute its excess profits credit by the income method for years prior to the taxable years for the purposes of excess profits carry-over to the taxable year ended November 30, 1943.

3. Whether there is any substance in taxpayers' miscellaneous allegations of error on the part of the Tax Court.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts, which are reflected principally by a stipulation of facts (R. 32-37) incorporating two exhibits (R. 37-42) and an additional stipulation covering portions omitted from the printed record (R. 132-133), may be stated as follows:¹

On March 16, 1933, Hawaiian Freight Association, Ltd., was organized as a corporation under the laws of the Territory of Hawaii to engage in the freight forwarding business. It was liquidated and dissolved on or about December 31, 1936, and its assets were distributed to its then shareholders, who were J. C. Leffel, owning 33 shares; G. C. Ballentyne, owning 24 shares; and A. G. Schnack, owning 10 shares. (R. 32.)

On or about January 2, 1937, these three former shareholders of Hawaiian Freight Association, Ltd., created a partnership, Hawaiian Freight Association, and to it transferred the assets and business theretofore owned and operated by Hawaiian Freight Association, Ltd. The interests of the partners were in the same proportions as their shareholdings in the predecessor corporation and so remained until March 8, 1940. (R. 33.)

The individual accounts of the partners as shown by their books and the audit reports of Tennant and Greaney, C.P.A.'s, for the calendar years 1937 to 1939, inclusive, were as follows (R. 36):

¹ The Tax Court found the facts as stipulated (R. 44) and also summarized the facts in its opinion (R. 44-48). Our statement of the facts is taken directly from the stipulations, except for one unstipulated fact stated by the Tax Court and based upon an exhibit.

	J. C. Leffel	G. C. Ballentyne	A. G. Schnack
Capital, % -----	49.26	35.82	14.92
Capital, Jan. 1, 1937 -----	\$ 8,366.42	\$ 6,083.67	\$2,534.03
Salary -----	4,200.00	3,815.00	-----
Profit -----	20,547.83	14,941.60	6,223.58
Totals -----	\$33,114.25	\$24,840.27	\$8,757.61
Drawings -----	15,247.29	11,926.48	3,346.03
Balance Dec. 31, 1937 -----	\$17,866.96	\$12,913.79	\$5,411.58
1937 profits drawn 1938 -----	9,500.54	6,830.12	2,877.55
Capital, Jan. 1, 1938 -----	\$ 8,366.42	\$ 6,083.67	\$2,534.03
Salary -----	4,650.00	4,650.00	-----
Profit -----	12,588.77	9,132.26	3,803.83
Totals -----	\$25,575.19	\$19,865.93	\$6,337.86
Drawings -----	10,657.99	8,998.60	1,000.00
Balance Dec. 31, 1938 -----	\$14,917.20	\$10,867.33	\$5,337.86
1938 profits drawn 1939 -----	6,550.78	4,783.66	2,803.83
Capital, Jan. 1, 1939 -----	\$ 8,366.42	\$ 6,083.67	\$2,534.03
Salaries -----	5,500.00	5,500.00	-----
Profit -----	9,121.37	6,632.71	2,762.71
Totals -----	\$22,987.79	\$18,216.38	\$5,296.74
Drawings -----	5,742.98	6,830.07	-----
Balance Dec. 31, 1939 -----	\$17,244.81	\$11,386.31	\$5,296.74

Prior to March 8, 1940, an understanding had been reached between Leffel and Ballentyne (two of the partners) and Oahu Railway and Land Company that a corporation would be formed to take over and operate the assets and business of Hawaiian Freight Association (the partnership), with Leffel, Ballentyne and Oahu as equal shareholders. It was believed that this would be to the mutual advantage of the parties concerned. (R. 33.)

On March 8, 1940, an agreement (Ex. A-1, R. 37-39) was entered into by and between Leffel, Ballentyne and Schnack (the three partners) with respect to Schnack's interest in Hawaiian Freight Association (the partnership). Under the agreement Schnack, in consideration of the receipt of \$8,000, withdrew from the partnership and released to Leffel and Ballentyne all of his interest in and to the remaining property and assets of

the partnership, with Leffel and Ballentyne to assume and pay all obligations of the partnership and save him harmless from any loss, damage or liability by reason of his having been a member of the partnership. (R. 33, 39.) The agreement explains the \$8,000 amount by the following language (R. 38):

Whereas for the period ending December 31, 1939, as shown by the audit of said co-partnership made by Tennent & Greaney, certified public accountants, the interest of said co-partnership amounts to the sum of Five Thousand Two Hundred Ninety-Six and 74/100ths Dollars (\$5,296.74), and

Whereas additional profits have been earned by said co-partnership for the period from December 31, 1939, to the date hereof, said profit together with the interest of said Party of the First Part [Schnack] in the good will and other assets of said co-partnership amounting to the agreed sum and value of Two Thousand Seven Hundred Three and 06/100th Dollars (\$2,703.06), the total interest of said Party of the First Part to date totaling Eight Thousand Dollars (\$8,000.00).

* * * * *

The payment of the \$8,000 referred to in the agreement was by check of the partnership drawn March 8, 1940. After the withdrawal of Schnack, Ballentyne and Leffel were equal partners in the business conducted by Hawaiian Freight Association. (R. 33.)

On March 13 or 14, 1940, the taxpayer corporation was organized under the laws of the Territory of Hawaii with a capital of \$120,000 represented by 6,000 shares which were issued 2,999 to Leffel and 2,998 to Ballentyne, three qualifying shares being nominally issued to others. (R. 33-34.) According to the minutes

of an adjourned meeting of the shareholders of the taxpayer corporation held on March 19, 1940 (see Ex. B-2, R. 40-42), the shares were issued to Leffel and Ballentyne (R. 41)—

in consideration of the transfer by said J. C. Leffel and said G. C. Ballentyne of all of the property and assets of said Hawaiian Freight Association, a co-partnership, including the sum of \$30,000 cash, said J. C. Leffel and G. C. Ballentyne being the sole co-partners of said co-partnership, * * *

For its 6,000 shares of stock the taxpayer corporation received the business and the following assets formerly owned by Hawaiian Freight Association (R. 34):

Cash	\$19,237.07
Receivables	9,151.08
Furniture and Fixtures..	1,341.86
Stationery and Supplies.	269.99
Goodwill	90,000.00
	<hr/>
	\$120,000.00

The transfer of these assets was completed on April 1, 1940, and the change of operations to corporate form was fully effected by April 1, 1940. The great bulk of the business was between Chicago and Honolulu and the time required from the initiation of business to delivery and collection of charges was normally three weeks. (R. 34.)

On July 2, 1940, a statement of dissolution of the Hawaiian Freight Association, dated June 26, 1940, was filed in the office of the Treasurer of the Territory of Hawaii. The statement of dissolution showed Leffel, Ballentyne and Schnack as the partners and recited that the partnership was dissolved on March 14, 1940.

The statement was executed by Schnack and Ballentyne. (R. 48, 123-124.)

Both the original and the amended partnership return of income for 1940 (Resp. Exs. D and E, respectively) covered in a single return the period from January 1, 1940, to March 31, 1940, and listed Leffel, Ballentyne and Schnack as partners (R. 133). The net income was in the amount of \$27,662.94, the return disclosing net income of \$27,658.54 which included a long term net capital loss of \$4.40 sustained April 5, 1940. (R. 36.)

Approximately \$30,000 of capital was required by the taxpayer corporation for its operations. (R. 37.)

The taxpayer corporation filed excess profits tax returns for its fiscal year ended November 30, 1941, and subsequent fiscal years. All of such returns claimed a credit on the average earnings method, utilizing as one of the factors the earnings of Hawaiian Freight Association (R. 34); that is, the average earnings of the partnership for the years 1936 to 1939, inclusive. For the fiscal years ended November 30, 1943, and November 30, 1944 (as well as the fiscal year ended November 30, 1942, which is not in controversy), the Commissioner determined deficiencies in excess profits tax resulting from a computation of taxpayer's excess profits credit by the invested capital method. (See R. 13, 19-20, 22-24, 44.) On petition to the Tax Court, taxpayer contended that it was entitled to compute its excess profits credit by the income method, that is, on the basis of the average earnings of the partnership during the years 1936 to 1939, inclusive. (R. 6-10.) The Tax Court rejected the contention and upheld the Commissioner's deficiency determination. (R. 44-54.)

SUMMARY OF ARGUMENT

1. Taxpayer is entitled to compute its excess profits credit by the income method for the taxable years ended November 30, 1943, and November 30, 1944, only if it was an "acquiring corporation", as defined in Section 740 (a)(1)(D) of the Internal Revenue Code, of a partnership which was in existence before January 1, 1940. Section 740 (a)(1)(D) defines an "acquiring corporation" as a corporation which acquired substantially all of the properties of a partnership in an exchange to which Section 112 (b)(5) is applicable. Section 112 (b)(5) in turn requires an exchange of property for stock of a corporation by persons who immediately after the exchange are in control of the corporation and who each receive stock or securities of the corporation substantially in proportion to their interests in the property prior to the exchange. In the present case the Leffel-Ballentyne-Schnack partnership was in existence before January 1, 1940, and it may be assumed that the taxpayer-corporation acquired substantially all of the properties of that partnership. However, under Section 740 (a)(1)(D), together with Section 740 (b)(5), the properties must have been acquired in an exchange with the Leffel-Ballentyne-Schnack partnership and in an exchange to which Section 112 (b)(5) is applicable. A partnership is not a juristic entity and is not treated as such for the purposes of Section 740 (a)(1)(D). Nor is it material that the taxpayer-corporation may have been the same "business unit" as the Leffel-Ballentyne-Schnack partnership.

Actually, the exchange of property for stock was not between taxpayer and the Leffel-Ballentyne-Schnack partnership, but was an exchange of the properties of the former partnership business by Leffel and Ballentyne as partners in a *new* partnership or as joint proprietors. Schnack had withdrawn from the Leffel-

Ballentyne-Schnack partnership on March 8, 1940. Leffel and Ballentyne thereupon became equal owners of the properties of the former partnership and shortly thereafter transferred the properties to the taxpayer-corporation, organized on March 14, 1940, in return for equal shares of stock of the taxpayer-corporation.

Assuming, as the Tax Court did, that the exchange was made by the members of the Leffel-Ballentyne-Schnack partnership, the proportionate requirement of Section 112 (b)(5) was not satisfied. On the exchange for stock of the taxpayer-corporation, Schnack received no stock or interest in the taxpayer-corporation and Leffel and Ballentyne each received more than their proportionate interests in the partnership.

Taxpayer is in the same situation as the taxpayer in *E. T. Renfro Drug Co. v. Commissioner*, 183 F. 2d 846 (C.A. 5th). It cannot avoid the two horns of a dilemma; the exchange involved was either with a new partnership or joint proprietorship which was not in existence before January 1, 1940, or, if with the Leffel-Ballentyne-Schnack partnership, did not satisfy the requirements of Section 112 (b)(5). The case lacks the continuity of interest in ownership required by Section 740 (a)(1)(D) as between ownership of the properties in partnership form prior to January 1, 1940, and in corporate form. For that reason taxpayer is not entitled to compute its excess profits credit by the income method on the basis of the average base period net income experience of the Leffel-Ballentyne-Schnack partnership.

2. If the Court should hold that taxpayer is entitled to compute its excess profits credit by the income method for the taxable years ended November 30, 1943, and November 30, 1944, taxpayer is not in any event entitled to compute its excess profits credit by the income method for prior years for carry-over purposes to

the taxable years. Its right to do so depended upon its making an election as required by Section 228 (f) of the Revenue Act of 1942 and Regulations promulgated thereunder by the Commissioner. Taxpayer admittedly did not make an election as required by the Regulations. It asserts an election simply on the basis of the fact that, both before and after the passage of the 1942 Act, it filed excess profits tax returns in which it computed its excess profits credit by the income method.

3. There is no substance to any of taxpayer's miscellaneous allegations of error on the part of the Tax Court.

. ARGUMENT

I

Taxpayer Was Not An "Acquiring Corporation", as Defined in Section 740 (a)(1)(D) of the Internal Revenue Code, of a Partnership Which Was in Existence Before January 1, 1940, and Therefore Is Not Entitled to Compute Its Excess Profits Credit By the Income Method for the Taxable Years Ended November 30, 1943, and November 30, 1944

In computing the amount of its income subject to excess profits tax for the taxable years ended November 30, 1943, and November 30, 1944, taxpayer is entitled to an excess profits credit, which, generally speaking, is designed to eliminate normal profits from subjection to the excess profits tax.² The Internal Revenue Code

² The excess profits tax here involved was imposed under subchapter E of the Internal Revenue Code, which was added to the Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, entitled "Excess Profits Tax Act of 1940", was applicable to taxable years beginning after December 31, 1939, and was in effect repealed as to taxable years beginning after December 31, 1945, by Section 122 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556. The tax was laid upon the "adjusted excess profits net income", which was the normal net income with certain adjustments less (1) a specific exemption, (2) an excess profits credit and (3) an unused excess profits credit adjustment. (See Sections 710 and 711 of the Code (26 U. S. C. 1946, ed., Secs. 710, 711).).

provides two methods for computation of the credit— (1) on the basis of invested capital, pursuant to Section 714 (Appendix, *infra*) and (2) on the basis of income, pursuant to Section 713 (Appendix, *infra*). Computation of the credit based on income is made on the basis of average income for the base period years 1936 and 1939, inclusive, and, accordingly, under Section 712(a) (Appendix, *infra*) only those corporations which were “in existence” before January 1, 1940, are authorized to use the income method to compute the amount of their credit. A corporation may have been “in existence” before January 1, 1940, either by reason of actual existence before that date or by virtue of being an “acquiring corporation”, as defined in Section 740 (a) (Appendix, *infra*), of a corporation, partnership or sole proprietorship (called a “component corporation”) which was in existence before January 1, 1940 (see Secs. 712 (d), 740 (b)(5) and (f), Appendix, *infra*). A corporation which is an “acquiring corporation” of such a “component corporation” may compute its excess profits credit by the income method, pursuant to Section 712 (a), by using the average base period net income experience of its “component corporation”. (See Secs. 740 (d) and (e) and 742 (g), Appendix, *infra*.)

The instant tax payer-corporation was not in actual existence on January 1, 1940. Its contention that it is entitled to compute its excess profits credit by the income method rests upon an argument that it was an “acquiring corporation” within the meaning of Section 740 (a)(1)(D); that is, that it was a corporation which acquired—

substantially all the properties of a partnership in an exchange to which section 112 (b)(5), * * *, or to which a corresponding provision of a prior revenue law, is or was applicable.

Section 112 (b)(5) (Appendix, *infra*) provides as follows:

(5) *Transfer to corporation controlled by transfer.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. * * *

The difficulty in taxpayer's position is that it is entitled to compute its excess profits credit by the income method only if it was an "acquiring corporation" *as to a partnership which was in existence before January 1, 1940*, as will be seen, and, while there was a Section 112 (b)(5) exchange in the present case, that exchange was between taxpayer and either a new partnership created on March 8, 1940, or Leffel and Ballentyne as joint proprietors. Controversy in the case results from taxpayer's attempt to argue itself into a position of being an "acquiring corporation" of the Leffel-Ballentyne-Schnack partnership, which was in existence before January 1, 1940.

A. The withdrawal of Schnack from the Leffel-Ballentyne-Schnack partnership cannot be ignored on the theory that the partnership is to be treated as a legal entity or on the ground that the taxpayer-corporation was the same "business unit" as the partnership

A partnership, operating under the name of Hawaiian Freight Association, with Leffel, Ballentyne and Schnack as partners existed prior to January 1, 1940. Leffel owned a 49.26 per cent interest, Ballentyne a 35.8 per cent interest, and Schnack a 14.92 per cent interest. On March 8, 1940, Schnack withdrew

from the partnership and was paid off in partnership funds. According to the stipulated facts, Leffel and Ballentyne thereupon became "equal partners" in the business conducted by Hawaiian Freight Association. On March 14 or 15, 1940, the taxpayer-corporation was organized. On March 19, 1940, at an adjourned meeting of the stockholders of the corporation, the officers of the corporation were authorized to issue one-half of the stock to Leffel and one-half to Ballentyne in consideration of the transfer by them to the corporation of the business and properties of the former partnership. By April 1, 1940, the transfer of business and properties of the former partnership to the taxpayer-corporation was fully effected.

Taxpayer apparently takes the position that the withdrawal of Schnack from the partnership should be ignored. (Br. 17-19.) In any event taxpayer argues that it should be permitted to compute its excess profits credit by the income method because it was the same "business unit" as the Leffel-Ballentyne-Schnack partnership (Br. 18) and because the partnership was or should be treated as a juristic entity (Br. 31-33). A partnership is not a juristic entity (*Commissioner v. Whitney*, 169 F. 2d 562 (C.A. 2d), certiorari denied, 335 U. S. 892; *Randolph Products Co. v. Manning*, 176 F. 2d 190 (C.A. 3d), and it cannot be treated as such for the purposes of Section 740 (a)(1)(D), as we shall show. Nor is it material that the taxpayer-corporation may have been the same "business unit" as the Leffel-Ballentyne-Schnack partnership.

In order to be entitled to compute its excess profits credit by the income method, pursuant to Section 712 (a), taxpayer must have been in existence prior to January 1, 1940. It was in existence prior to January 1, 1940, if it had a "component corporation" which was in existence before that date. (Section 740

(f).) It had a "component corporation" in existence before that date if it was an "acquiring corporation" as defined in Section 740 (a)(1)(D) of a partnership which was in existence before that date. (Section 740 (b)(5).) To be an "acquiring corporation" within the meaning of Section 740 (a)(1)(D) of a partnership which was in existence before that date, taxpayer must have acquired the properties of such a partnership in an exchange to which Section 112 (b)(5) is applicable. Section 112 (b)(5) covers an exchange of property for stock or securities of a corporation where the transferring persons are immediately thereafter in control of the corporation, but applies only if the stock and securities received by each person "is substantially in proportion to his interest in the property prior to the exchange".

The plain effect of Section 740 (a)(1)(D) is *not* that in the case of *all* transfers of a partnership business to a corporation the corporation will take over the base period income experience of the partnership business. This is permitted *only* in the case of a transfer of substantially all the properties of a partnership in an exchange falling within Section 112 (b)(5). That means an exchange whereby one or more persons transfer property to a corporation solely for stock of the corporation and when "no substantial change occurs in the beneficial ownership and control of the property". *Snead v. Jackson Securities & Investment Co.*, 77 F. 2d 19, 21 (C.A. 5th), certiorari denied, 296 U. S. 599. In other words, a corporation is permitted under Section 740 (a)(1)(D) to use the base period income experience of a partnership only when it has acquired substantially all of the properties of the partnership in a transaction which, coming within the terms of Section 112 (b)(5), really involved no more than a mere change in the *form of ownership* of the properties. It is well set-

tled that if upon the exchange there results a change in ownership, either in the identity of the owners or in the proportionate interest of each, or if each of the transferors does not receive stock substantially in proportion to his interest in the property before the exchange, the transaction is not one within Section 112 (b) (5). See *Snead v. Jackson Securities & Investment Co.*, *supra*; *American Compress & Warehouse Co. v. Bender*, 70 F. 2d 655 (C.A. 5th), certiorari denied, 293 U. S. 607; *Hillyer, Edwards, Fuller v. United States*, 52 F. 2d 742 (E.D. La.); see also, *United Carbon Co. v. Commissioner*, 90 F. 2d 43 (C.A. 4th); *Bodell v. Commissioner*, 154 F. 2d 407 (C.A. 1st); *Mather & Co. v. Commissioner*, 171 F. 2d 864 (C.A. 3d), certiorari denied, 337 U. S. 907; and *Elmore Milling Co. v. Helvering*, 70 F. 2d 736 (C.A. D.C.).

By requiring an exchange to which Section 112 (b) (5) is applicable, Section 740 (a) (1) (D) requires continuity of interest in the owners of the property, not mere continuation of the business as a "business unit". That fact also precludes any notion that a partnership should be treated as a juristic entity for the purposes of Section 740 (a) (1) (D). Section 112 (b) (5) relates to a transfer of property by *persons*, not by a juristic entity, and Section 740 (a) (1) (D), in requiring a Section 112 (b) (5) exchange of the properties of a *partnership*, requires an exchange by the persons who are the partners. If one partner withdraws from the partnership, or ownership of the partnership properties is changed in some other way, there is not the required continuity of interest in ownership as between the "acquiring corporation" and the partnership whose properties it acquired. Since continuity of interest in ownership is required, it cannot be ignored in favor of treating a partnership as a juristic entity.

B. To benefit from being an "acquiring corporation" as defined in Section 740 (a)(1)(D), taxpayer must have been an acquiring corporation of a partnership which was in existence before January 1, 1940

If the exchange of properties of the partnership business for stock of the taxpayer-corporation was made by Leffel and Ballentyne as partners in a new partnership or as joint proprietors, the exchange, while fulfilling the requirements of Section 112 (b)(5), was not an exchange which aided taxpayer for excess profits tax purposes.

In order to be an "acquiring corporation" as defined in Section 740 (a)(1)(D), taxpayer must have acquired substantially all of the properties of a *partnership* in an exchange to which Section 112 (b)(5) was applicable. If taxpayer acquired substantially all of the properties of a new partnership (or perhaps of a joint proprietorship) created on March 8, 1940, between Leffel and Ballentyne, the partnership whose properties it acquired (the Leffel-Ballentyne partnership or proprietorship) was taxpayer's "component corporation" as that term is defined in Section 740 (b)(5).³ Since that "component corporation" was not in existence before January 1, 1940, taxpayer is not aided by Section 740 (f) which provides that an "acquiring corporation" shall be considered to have been in existence before January 1, 1940, if its "component corporation" was in existence before January 1, 1940.

Nor does it aid taxpayer that its "component corporation" (the Leffel-Ballentyne partnership) had acquired the properties of the Leffel-Ballentyne-Schnack partnership which existed before January 1, 1940. In

³ In connection with the distinction between a new partnership and a joint proprietorship, it may be noted that Section 740 (h) provides that, for the purposes of Section 740 (a)(1)(D), Section 740 (b)(5) and Section 742 (g), the business of a *sole* proprietorship shall be considered a partnership.

that connection Section 740 makes a distinction between acquired corporations and acquired partnerships. Under Section 740 (g) (Appendix, *infra*), a corporation acquired by a corporation which was in turn acquired by the taxpayer-corporation is also considered a "component corporation" of the taxpayer-corporation. But that section by its terms applies only to acquired corporations and, moreover, a partnership cannot be an acquiring corporation within the meaning of Section 740 (a), as Treasury Regulations 112, Section 35.740-4 (Appendix, *infra*), provide.⁴

C. Taxpayer was not an "acquiring corporation" as to the partnership which was in existence before January 1, 1940

Taxpayer is therefore entitled to compute its excess profits credit by the income method only if it was an "acquiring corporation", as defined in Section 740 (a)(1)(D), of the Leffel-Ballentyne-Schnack partnership, which, unlike any new partnership which might have been formed on March 8, 1940, had been in existence before January 1, 1940.⁵ To be an "acquiring corporation" of that partnership (or "component corporation"), taxpayer must have acquired substantially

⁴ The reason is apparent. The definition of an "acquiring corporation" contained in Section 740 (a)(1) relates only to "corporations" and contains no reference to the exchange of properties of a partnership other than paragraph (D), which requires a Section 112 (b)(5) exchange of stock or securities of a corporation for properties of a partnership.

⁵ The Tax Court did not reach the question whether the withdrawal of Schnack created a new partnership on March 8, 1940. The Tax Court did, however, note that there was no intention to continue the business in partnership form; that only three weeks elapsed between the time of Schnack's withdrawal and the completion of the transfer of property to taxpayer and that the three-week gap was due to the fact that it took three weeks to complete all business which had been initiated and was in progress. (R. 50.)

all of the properties of that partnership in an exchange to which Section 112 (b) (5) is applicable.

Assuming *arguendo* that taxpayer acquired "substantially all of the properties" of the Leffel-Ballentyne-Schnack partnership, the acquisition was not made in an exchange to which Section 112 (b) (5) is applicable. A Section 112 (b) (5) exchange is a transfer by one or more persons of property to a corporation solely in exchange for stock or securities in such corporation, with such person or persons in control of the corporation immediately after the exchange, provided that—

in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. * * *

For taxpayer to have been an "acquiring corporation" as to the Leffel-Ballentyne-Schnack partnership, there must have occurred an exchange of properties of that partnership for stock of the taxpayer-corporation by the members of that partnership and the partners must each have received stock in proportion to their partnership interests. There obviously was no exchange between the members of the Leffel-Ballentyne-Schnack partnership and the taxpayer-corporation, for Schnack had withdrawn from the partnership prior to the exchange with the taxpayer-corporation and it was Leffel and Ballentyne who actually made the exchange.

However, assuming (as the Tax Court did) that there was an exchange between the members of the Leffel-Ballentyne-Schnack partnership and the taxpayer-corporation, the exchange was not one which satisfied the proportionate requirements of Section 112 (b) (5).

In the partnership, Leffel had a 49.26 per cent interest, Ballentyne a 35.82 per cent interest and Schnack a 14.92 per cent interest. (See R. 36.) On the exchange of the partnership property for stock, Schnack received no stock or other interest in the taxpayer-corporation and Leffel and Ballentyne each received 50 per cent of the stock of the taxpayer-corporation. Since the proportionate requirement of Section 112 (b)(5) was not satisfied, there was no Section 112 (b)(5) exchange as between taxpayer and the Leffel-Ballentyne-Schnack partnership, taxpayer was not an "acquiring corporation" of that partnership within the meaning of Section 740 (a)(1)(D), and taxpayer accordingly was not "in existence" before January 1, 1940, in order to be entitled under Section 712 (a) to compute its excess profits credit by the income method.

It does not aid taxpayer to argue, as it does (Br. 26), that the proportionate requirement of Section 112 (b)(5) was satisfied because immediately prior to the incorporation of the taxpayer-corporation Leffel and Ballentyne were equal partners (after the withdrawal of Schnack) and upon taxpayer's incorporation they each received 50 per cent of taxpayer's stock. Such an argument amounts to an assertion that there was a Section 112 (b)(5) exchange of properties of a *new* partnership or joint proprietorship, not of the Leffel-Ballentyne-Schnack partnership. If that assertion is accepted, taxpayer is faced with the other horn of its dilemma, for, as we have already shown, an exchange with a new partnership or joint proprietorship does not entitle taxpayer to use the average base period net income experience of the Leffel-Ballentyne-Schnack partnership to compute its excess profits tax credit by the income method.

The situation here is similar to that presented in *E. T. Renfro Drug Co. v. Commissioner*, 183 F. 2d 846 (C.A.

5th). In that case two members of several partnerships purchased the undivided one-third interest of the third partner in each partnership and transferred the properties of the partnership to a corporation. There, as here, the question was to the effect in the computation of the taxpayer's excess profits credit. The Tax Court had held that upon the purchase of the third partner's interest either one of two things occurred—either there was then created a new partnership which acquired the assets of the old partnerships or the assets of the old partnerships were acquired by the purchasers as joint proprietors—and that in either event the property of the partnerships passed through the hands of a partnership or individuals who could not transfer to the corporation the business experience of the partnerships during the base period years because the intervening proprietors were not “acquiring corporations” as defined in the Code. There the taxpayer argued that the original partnerships continued until their affairs were wound up and the net assets distributed to those entitled thereto, that is, to the two purchasing partners. The Fifth Circuit answered (p. 847):

Petitioner's argument fails to convince us that the Tax Court was in error in evaluating the legal effect of the transaction. It confuses the rule of dissolution and subsequent “winding up” for the benefit of, and distribution of assets to, the members of the dissolved partnership, with the rights of the purchasers of a partnership interest to deal with such purchased interest as they may choose. Thus, dependent upon the facts of any case, the purchasers might continue a partnership, but unless we attribute to a partnership an independent juristic entity, which the law does not permit, it would not be the original partnership, but a new

one. In the absence of such agreement for continuance as partners, the purchasers would hold as joint proprietors. *The petitioner has failed to show us how its claim can legally avoid the two horns of the dilemma with which it is confronted: the new partnership or joint proprietorship on the one side, or on the other, impalement upon the horn of inability to meet the test of the Internal Revenue Code § 112 (b) (5), which excepts the transfer "only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."* (Italics supplied.)

The decisions relied upon by taxpayer are distinguishable. *Ransohoffs, Inc. v. Commissioner*, 9 T. C. 376, involved a California partnership the members of which had expressly agreed to continue the partnership, not merely the business, after the death of one of the partners. *Faigle Tool & Die Corp. v. Commissioner*, 7 T. C. 236, involved the acquisition of properties of a sole proprietorship, rather than of a partnership, and the only question in the case was whether the exchange was of "substantially all" of the properties of the sole proprietorship, as required by Section 740 (a) (1) (D). *A. C. Burton & Co. v. Commissioner*, 190 F. 2d 115 (C.A. 5th), also involved the acquisition by a corporation of the properties of a sole proprietorship and the only question was whether the corporation had acquired "substantially all" of the properties of the sole proprietorship in exchange for stock. As previously stated, the instant case is on all fours with *E. T. Renfro Drug Co. v. Commissioner*, *supra*, decided by the Fifth Circuit.

II

Taxpayer Was Not in Any Event Entitled to Compute Its Excess Profits Credit By the Income Method for Prior Years for the Purposes of Excess Profits Carry-Over to the Taxable Year Ended November 30, 1943

If taxpayer was not an "acquiring corporation" as to the Leffel-Ballentyne-Schnack partnership, as the Tax Court held, it is not entitled to compute its excess profits credit by the income method, either for the taxable years or for prior years for purposes of excess profits credit carry-over to the taxable years, because it was not an "acquiring corporation" of a partnership which was in existence before January 1, 1940. If this Court should reverse the Tax Court and hold that taxpayer was an "acquiring corporation" as to the Leffel-Ballentyne-Schnack partnership, an additional question is presented with respect to excess profits credit carry-over to taxpayer's fiscal year ended November 30, 1943. The carry-over of credit could come only from prior years. As taxpayer states (Br. 40), prior to the enactment of the Revenue Act of 1942, c. 619, 56 Stat. 798, it was entitled to compute its excess profits credit by the income method only if its "component corporation" was in existence on January 1, 1936, as distinguished from January 1, 1940. The Leffel-Ballentyne-Schnack partnership was not in existence on January 1, 1936. By virtue of amendments made by Section 228 of the 1942 Act, taxpayer became entitled to compute its excess profits credit by the income method if its "component corporation" was in existence before January 1, 1940. Section 228 (f) of the 1942 Act (Appendix, *infra*), provided that the amendments made by Section 228 should apply to taxable years beginning before December 31, 1941, only if the taxpayer—

within the time and in the manner and subject to such regulations as the Commissioner with the ap-

proval of the Secretary prescribes, elects to have such amendments * * * apply retroactively to all taxable years of the taxpayer beginning after December 31, 1949, such amendments shall also be applicable to the computation of the tax for taxable years beginning after December 31, 1939.

The Commissioner promulgated Regulations pursuant to this statutory provision. (See Regulations 109, Sec. 30.742-2(e), Appendix, *infra*.)

Taxpayer admittedly did not comply with the Regulations promulgated by the Commissioner. Taxpayer's contention is simply that, because it filed excess profits tax returns in which it had computed its credit by the income method, both before and after the amendments made by the 1942 Act, it made an election to have the 1942 amendments apply retroactively. (Br. 41-43.) The contention, we submit, requires no argument—particularly since taxpayer's excess profits tax returns are not contained in the printed record and it cannot be ascertained whether the returns substantiate taxpayer's assertion that "All of its returns contained the necessary data and information required by the regulations". (Br. 41.)

III

There Is No Substance in Taxpayer's Miscellaneous Allegations of Error on the Part of the Tax Court

Taxpayer asserts that the Tax Court committed numerous miscellaneous errors requiring reversal. (Br. 43-53.) These will be discussed below in the order in which they are presented by taxpayer.

A. Taxpayer's complaint that the Tax Court failed to make findings of fact (Br. 44-45) is unwarranted. The Tax Court found the facts as stipulated (R. 44) and also summarized the facts in its opinion (R. 44-

48). What taxpayer apparently considers should have been made as findings of fact (see Br. 45) would have been conclusions of law.

B. Taxpayer's assertion that the Tax Court made factual statements contrary to the stipulated facts and other evidence (Br. 45-47) consists principally of a distortion of statements of the Tax Court. This Court would not in any event be bound by statements of fact contrary to the stipulated facts.

C. Taxpayer's statement that the Tax Court decided the case on a basis not presented or argued to the Tax Court (Br. 47-51) is specious. There undoubtedly was a Section 112 (b)(5) exchange as between taxpayer and Leffel and Ballentyne but, in order to be entitled to compute its excess profits credit by the income method, taxpayer was required to show an exchange between it and the members of the Leffel-Ballentyne-Schnack partnership which existed before January 1, 1940. In the Tax Court the Commissioner argued that the withdrawal of Schnack from the partnership created a new partnership, thereby precluding an exchange between taxpayer and the Leffel-Ballentyne-Schnack partnership. The Tax Court assumed that the exchange was between taxpayer and the Leffel-Ballentyne-Schnack partnership and held that the exchange did not satisfy the proportionate requirements of Section 112 (b)(5). The requirements of Section 112 (b)(5) had to be met if taxpayer was to be considered an "acquiring corporation" of the Leffel-Ballentyne-Schnack partnership within the meaning of Section 740 (a)(1)(D) and those requirements could not have been ignored by the Tax Court even if the parties had stipulated that they should be. All that the Tax Court did was to decide the case on the basis of one horn, rather than the other horn, of taxpayer's dilemma. Cf. *E. T. Renfro Drug*

Co. v. Commissioner, supra. What taxpayer has done, either through design or confusion, is to argue each horn of the dilemma on the basis of the existence of the other horn of the dilemma.

D. Taxpayer asserts procedural error because a judge of one Division of the Tax Court, Judge Turner, decided the case after it had been heard by a judge of another Division, Judge Van Fossan. (Br. 51-53.) Whether that was procedural error or not is immaterial. The hearing before Judge Van Fossan was very brief and consisted only of explanations of the case by counsel and the introduction of a stipulation of facts and documentary exhibits (see R. 70-83), no oral testimony having been offered. Taxpayer could not possibly have been prejudiced by the fact that the case was decided by one judge, rather than by another, on the record as made. Indeed, on hearing on motions filed by taxpayer after the rendition of Judge Turner's opinion, taxpayer's counsel had a full opportunity, of which he availed himself, of presenting to Judge Turner any objections he had to the opinion. (See R. 83-118.)

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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NOVEMBER, 1951.

APPENDIX

Internal Revenue Code:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. * * *

(26 U.S.C. 1946 ed., Sec. 112.)

SUBCHAPTER E—EXCESS PROFITS TAX

[as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]

Part I

* * * * *

SEC. 712. EXCESS PROFITS CREDIT—ALLOWANCE.

(a) [as amended by Sec. 13 of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17] *Domestic Corporations.*—In the case of a domestic

corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. In the case of all other domestic corporations the excess profits credit for any taxable year shall be an amount computed under section 714. (For allowance of excess profits credit in case of certain reorganizations of corporations, see section 741.)

* * * * *

(d) [as added by Sec. 228 (e)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Special Rule in Connection with Certain Reorganizations.*—For the existence of taxpayer through component corporation, see section 740 (f).
(26 U.S.C. 1946 ed., Sec. 712.)

SEC. 713. EXCESS PROFITS CREDIT.—BASED ON INCOME.

(a) [as amended by Sec. 4 (a) of the Excess Profits Tax Amendments of 1941, *supra*, and Sec. 228 (e)(2) of the Revenue Act of 1942, *supra*] *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g), or

(C) Minus 6 per centum of the net capital reduction as defined in subsection (g).

* * * *

(26 U.S.C. 1946 ed., Sec. 713.)

SEC. 714 [as amended by Sec. 201 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687]. EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL.

The excess profits credit for any taxable year, computed under this section, shall be the amount shown in the following table: [showing percentages of invested capital of certain amounts]

* * * *

(26 U.S.C. 1946 ed., Sec. 714.)

Part II—Rules in Connection With Certain Exchanges

Supplement A—Excess Profits Credit Based on Income

SEC. 740 [as amended by Sec. 228 (a) of the Revenue Act of 1942, *supra*]. DEFINITIONS.

For the purposes of this Supplement—

(a) *Acquiring Corporation*.—The term “acquiring corporation” means—

(1) A corporation which has acquired—

* * * *

(D) [as added by Sec. 8 (a) of the Excess Profits Tax Amendments of 1941, *supra*] substantially all the properties of a partnership in an exchange to which section 112 (b)(5), or so much of section 112 (c) or (e) as refers to section 112 (b)(5), or to which a corre-

sponding provision of a prior revenue law, is or was applicable.

* * * * *

(b) *Component Corporation*.—The term “component corporation” means—

* * * * *

(5) [as added by Sec. 8 (b) of the Excess Profits Tax Amendments of 1941, *supra*] In the case of a transaction specified in subsection (a)(1)(D), the partnership whose properties were acquired.

* * * * *

(d) In the case of a taxpayer which is an acquiring corporation the base period shall be the four calendar years 1936 to 1939, both inclusive, except that, if the taxpayer became an acquiring corporation prior to September 1, 1940, the base period shall be the same as that applicable to its first taxable year ending in 1941.

(e) *Base Period Years*.—In the case of a taxpayer which is an acquiring corporation its base period years shall be the four successive twelve-month periods beginning on the same date as the beginning of its base period.

(f) *Existence of Acquiring Corporation*.—For the purposes of section 712 (a), if any component corporation of the taxpayer was in existence before January 1, 1940, the taxpayer shall be considered to have been in existence before such date.

(g) *Component Corporations of Component Corporations*.—If a corporation is a component corporation of an acquiring corporation, under subsection (b) or under this subsection, it shall (except for the purposes of section 742 (d)(1)

and (2) and section 743 (a)(1) and (3)) also be a component corporation of the corporation of which such acquiring corporation is a component corporation.

* * * * *

(26 U.S.C. 1946 ed., Sec. 740.)

SEC. 742 [as amended by Sec. 228 (c) of the Revenue Act of 1942, *supra*]. SUPPLEMENT A AVERAGE BASE PERIOD NET INCOME.

* * * The Supplement A average base period net income shall be computed as follows:

* * * * *

(g) [as added by Sec. 8(d) of the Excess Profits Tax Amendments of 1941, *supra*] In the case of a partnership which is a component corporation by virtue of section 740 (b)(5), the computations required by this Supplement shall be made, under rules and regulations prescribed by the Commissioner with the approval of the Secretary, as if such partnership had been a corporation. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 742.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 228. RULES FOR INCOME CREDIT IN CONNECTION WITH CERTAIN EXCHANGES.

* * * * *

(f) *Taxable Years to Which Amendments Applicable*.—The amendments made by this section shall be applicable only to the computation of the tax for taxable years beginning after December 31, 1941, except that (1) the last sentence of section 740 (c), as added by subsection (a) of this section shall be applicable to the computation of

the tax for all taxable years beginning after December 31, 1939, and (2) if a taxpayer, within the time and in the manner and subject to such regulations as the Commissioner with the approval of the Secretary prescribes, elects to have such amendments (except those which by their terms are limited to taxable years beginning after December 31, 1941, and except that referred to in clause (1)) apply retroactively to all taxable years of the taxpayer beginning after December 31, 1939, such amendments shall also be applicable to the computation of the tax for taxable years beginning after December 31, 1939.

Treasury Regulations 109, promulgated under the Internal Revenue Code:

SEC. 30.742-2. * * *

* * * * *

(e) [as added by T. D. 5242, 1943 Cum. Bull. 692, 715, 734] *Election to have amendments to Supplement A made by Revenue Act of 1942 apply to taxable years beginning after December 31, 1939, and before January 1, 1942.*—A taxpayer may elect to have the amendments to Supplement A made by the Revenue Act of 1942 apply retroactively (with the exceptions indicated below) to all its taxable years beginning after December 31, 1939, and before January 1, 1942. If a taxpayer elects to have such amendments so apply, each such amendment shall be applicable to such taxable years, except such of the amendments as by their terms are limited to taxable years beginning after December 31, 1941. The election does not apply to the last sentence of section 740 (c), as added by the Revenue Act of 1942, or to the repeal of section 741 (b), which amendments by their terms are retroactive

to all taxable years beginning after December 31, 1939. The amendments which by their terms are limited to taxable years beginning after December 31, 1941, and therefore are also not subject to the election are the provisions of section 740 (c) (except the last sentence thereof) and section 742 (b) (2).

If the taxpayer desires to make the election described in the preceding paragraph, the election must be made on or before whichever one of the following applicable dates occurs first:

(1) June 15, 1943, if an excess profits tax return for a taxable year beginning after December 31, 1941, is filed for such year and if such return is filed on or before June 15, 1943,

(2) the date of the filing of the taxpayer's excess profits tax return for its first taxable year beginning after December 31, 1941, for which an excess profits tax return is filed if such return is filed after June 15, 1943, or

(3) the date of expiration of 30 months after the filing of the excess profits tax return (or, if no such return was filed, after the date on which such return was due or would have been due if such return were required to be filed) for the taxpayer's first taxable year beginning after December 31, 1939.

The election once made shall be irrevocable and shall apply to all taxable years of the taxpayer beginning before January 1, 1942.

In order to make such election, the taxpayer shall, within the time prescribed, file with the collector the following:

(i) A statement that the taxpayer elects to have such amendments apply to each of the tax-

able years beginning after December 31, 1939, and before January 1, 1942, and

(ii) A statement with respect to each such taxable year setting forth (A) the Supplement A average base period net income for such taxable year, computed under Supplement A as amended by such amendments, (B) the excess profits credit for such year based upon the Supplement A average base period net income for such year so computed, and (C) the excess profits tax or unused excess profits credit (as defined in section 710 (c)(2)), if any, as the case may be, for such year resulting from the use of the excess profits credit so computed. Such statement shall not constitute a claim for credit or refund. If the application of the amendments made by the Revenue Act of 1942 results in an overpayment in the amount of tax for any taxable year, a timely claim for credit or refund on Form 843 should be filed in the usual manner. For limitations upon credits and refunds generally, see section 322.

Treasury Regulations 112, promulgated under the Internal Revenue Code:

SEC. 35.740-4. *Partnerships and sole proprietorships under Supplement A*—A partnership (or a business owned by a sole proprietorship) can be a component corporation for the purposes of Supplement A, subject to the exceptions in section 740 (g). However, a partnership (or a business owned by a sole proprietorship) cannot be an acquiring corporation and, therefore, section 740(g) cannot operate to make any of its predecessors component corporations of its acquiring corporation.

No. 12,965

IN THE

United States Court of Appeals
For the Ninth Circuit

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR THE PETITIONER.

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FILED

DEC 28 1951

PAUL P. O'BRIEN

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REPLY BRIEF FOR THE PETITIONER.

PRELIMINARY STATEMENT.

Respondent is to be congratulated in that his argument, at least in part, reduces the controversy in main to what at all times has been the basic issue presented. While this issue is not clearly stated in the respondent's brief, it is implicit throughout:

Was a new partnership created by the withdrawal of Dr. Schnack, and if so, is petitioner precluded from using the earnings experience of the predecessor partnership? (Compare Stipulation Par. 13, Tr. 37.)

On the other hand, at least in part, respondent endeavors to confuse this issue, or at least, his brief has that consequence. He nowhere discusses the law

most pertinent to this issue, the law of Hawaii. He nowhere discusses the basic remedial purpose of Congress in enacting Supplement A. He attempts to beg the question throughout by referring to the partnership, not by name, but in terms of “the Leffel-Ballentyne-Schnack Partnership” and “the Leffel-Ballentyne Partnership”, and nowhere does he attempt to really discuss or answer the basic question answered so definitely and clearly in the case of *Ransohoffs, Inc. v. Commissioner*, 9 T.C. 376; i.e., whether under local law or for the purposes of the taxing act, the same partnership continued or a new partnership was created.

As did the Tax Court, he practically ignores the stipulated fact that from and after the date of Schnack’s withdrawal Leffel and Ballentyne *were equal partners*, not joint proprietors (Tr. 33). He ignores, also, the pertinent language in Exhibit A-1 (Tr. 39) which clearly establishes that the partnership *was* to be continued by Leffel and Ballentyne pursuant to written agreement between themselves and Dr. Schnack, at least for the period required to complete the business in progress and to effect the transfer of assets to the corporation.

He admits that the Tax Court never reached this fundamental issue (Br. p. 17, footnote 5). He impliedly admits, by failure to argue the point, that the Tax Court’s conclusion was contrary to the stipulated facts and the documentary exhibits. Those facts incontrovertibly establish that the partnership *was intended to continue* and that *it did continue*, at least

from March 8 to April 1, and under the law of the Territory, until July 2, 1940.

The respondent thus admits that the Tax Court never decided the case presented to it and, inferentially, that it decided a controversy never presented to it.

The respondent's argument is technical but his technicalities are fictitious, not real. He fails to discuss the true technical aspects. The most pertinent regulation is nowhere discussed:

“* * * a partnership (or a business owned by a sole proprietorship) cannot be an acquiring corporation.”

Petitioners submits that these words have no reference to a readjustment of partnership interests in a continuing venture, but taken in their context and ordinary meaning are concerned with actual, not fictitious or technical acquisitions by one partnership of the properties of what was clearly in substance a distinct entity. The reasonableness of this interpretation is particularly evident if we consider the broad remedial purpose of Congress (nowhere discussed by respondent) in light of the basic purpose of the taxation of *excess* profits.

ARGUMENT.**I.****PETITIONER HAS MET THE REQUIREMENTS OF
SECTION 740(a)(1)(D).**

Respondent has accused petitioner's counsel of piecemeal, circuitous, reasoning, a criticism such counsel feels more strongly justified in the opposite direction. To more clearly show this the three subdivisions of the argument on the basic issue have been consolidated in this reply.

The cases cited by respondent on pages 14 and 15 of his brief in no way support his position. It is axiomatic that for a transaction to qualify under Section 112(b)(5) I.R.C. the transferors must have received stock of the transferee in proportion to the value of their respective interests in the property transferred as such value existed immediately prior to the transfer. There is no requirement that the interests or values shall have remained unchanged prior thereto.

The one way in which the requirements of Section 112(b)(5) could not have been met would have been if Leffel-Ballentyne and Schnack had received stock other than in proportion to *the value of* their interests in the partnership at the time of transfer. At that time the value of the interests was entirely in Leffel and Ballentyne. Respondent accedes that as concerns them the transaction with petitioner undoubtedly was a Section 112(b)(5) exchange (Br. 24).

Respondent thereby concedes that unless the "Leffel-Ballentyne-Schnack" partnership was termi-

mated by the readjustment of interests therein, there is no Section 112(b)(5) problem. His major premise, never stated but assumed, is that the readjustment of interests had that effect. Having so assumed he then argues that because the value of the interests of the partners was different prior to March 8, 1940, there was no Section 112(b)(5) transfer of *the partners'* prior interests in the properties.

The statutory language in Section 740(a)(1)(D) is not discussed by respondent. The pertinent language states that "a corporation which has acquired substantially *all the properties of a partnership* in an exchange to which Section 112(b)(5). * * * was applicable" will entitle the corporation to use the partnership experience. Respondent would change this to read, in part:

"substantially the *properties of the partners* held in partnership without change in their proportionate ownership."

The respondent states (Br. 15) that Section 112(b)(5) relates to a transfer of property by *persons*, not by a juristic entity and that therefore Section 740(a)(1)(D) requires continuity of interest in the owners of the property. But, as will be shown, *the partnership owned* the properties (as contemplated by Congress), the partners owned their interests in the partnership. It was because of their interests in the partnership that they received (theoretically, at least, as a partnership distribution in kind) the stock of petitioner proportionate to the value of such interests in the partnership.

Respondent's assertion that Section 112(b)(5) refers to persons, not a juristic entity, is in any event completely false. "Person" and "persons" when used in that section have the meaning ascribed by the Internal Revenue Code. Section 3797(a)(1) provides:

"Person. The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation."

American Compressor and Warehouse Co. v. Bender, 70 F. (2d) 655 (C.A. 5, 1934) and *United Carbon Co. v. Commissioner*, 90 F. (2d) 43 (C.A. 4, 1937) both cited by respondent, establish very clearly that the use of the word "persons" in Section 112(b)(5) is within the meaning ascribed to that term by the Internal Revenue Code and particularly by Section 3797(a)(1).

In both of these cited cases the transferors were corporations rather than natural persons and in *American Compressor and Warehouse Co.*, supra, the point is specifically decided contrary to the respondent's position.

Section 112(b)(5) is concerned with the *value* of interests and the cases therefore give full effect to equitable interests in existence before the transfer. In *Elmore Milling Co. v. Helvering*, 70 F. (2d) 736, 737, cited by respondent, the Court stated:

"Certainly there was no express assignment, and if we consider the instructions with relation to the manner of issue of stock, contained in the offer, as an equitable assignment, we are unable to see whether it applied to the interest in the

partnership or to the interest in the stock when issued by the Corporation.”

In *Roberts Company, Inc.*, 5 T.C. 1, (1945) the four residuary legatees of an estate having equal interests therein organized a corporation to hold certain parcels of real property, they and their attorneys taking stock in varying percentages quite different from those held in the estate. The Tax Court held that there had been equitable assignments prior to the organization of the corporation and the transfer to it and that the stock received was substantially in proportion to the value of the interests of each in the property prior to the transfer.

In *F. G. Straubel*, 29 B.T.A. 516 (1933) it was held that a valid oral assignment of equitable interests had been made prior to transfer to a new corporation in exchange for its stock and that therefore the transaction met the test of Section 112(b)(5).

One of the leading tax authors has expressed a similar view. 3 *Mertens Law of Federal Income Taxation* 174. In his hypothetical case, A, B and C are equal partners in a partnership having assets of \$100,000 and liabilities in the same amount. A and B desire to transfer the business to a corporation and provide additional capital, but C does not desire to participate. \$50,000 of cash and the partnership properties are transferred to the corporation in exchange for stock issued equally to A and B and the assumption of the partnership liabilities. The author concludes that Sec. 112(b)(5) is applicable to this transaction.

In the same text at page 176, he suggests that in all instances in which one or more partners or co-adventurers do not desire to participate further and particularly in corporate form, the solution is acquisition of the dissenting interest prior to the transfer:

“In that case the dissenting co-adventurers will of course, realize taxable gain or loss on their sale to the others but the latter will not have recognized gain or loss upon incorporation.”¹

The points above set forth in answer to the Respondent's contentions to a very substantial extent are a complete answer to the argument appearing on pages 17 to 19 of his brief. To a considerable extent, the respondent's confusion (and perhaps that of the Tax Court) comes from his use of labels and names which are distinctly meaningless and beg the question presented. Thus, it is only if we refer to a “Leffel-Ballentyne-Schnack Partnership” and later to a “Leffel-Ballentyne Partnership”, that there is any implication that a new partnership was created rather than that the same partnership continued.

The respondent makes no argument, and offers no proof of any kind that a new partnership was created. Contrary to the documentary evidence and stipulated facts and contrary to the law of the Territory of Hawaii, he attempts to build an inference that

¹Since a readjustment of partnership interests before incorporation from qualifying under I.R.C. Sec. 112(b) (5), it is obvious that the “dilemma” of which respondent is so proud, does not exist even on technical grounds. It goes without saying that such “dilemma” can not be even asserted on anything other than technical grounds.

Schnack's withdrawal created either a new partnership or a joint proprietorship.

He speaks of the petitioner being on either horn of a "dilemma", a dilemma which is purely fictitious unless Schnack's withdrawal had the effect which the respondent, without evidence and contrary to the evidence and to the law of the Territory states that it had of creating either a new partnership or a joint proprietorship. He does not attempt to answer the petitioner's evidence or arguments in this respect because he knows he cannot succeed in doing so; so he sets up a "dilemma" purely of his own making and which does not in any way exist.

Actually there is a dilemma in the proceeding, and not an artificial one either. The evidence and the law applicable thereto establish either:

1. The partnership of Ballentyne, Leffel and Schnack continued after March 8, 1940 but with Schnack having no interest in the properties, (as provided by Hawaiian law), or

2. The partnership continued in accordance with the agreement of the partners and as permitted under Hawaiian law with Leffel and Ballentyne as the sole and equal continuing partners.

3. The partnership ended on March 8, 1940 and petitioner acquired the business and properties of that partnership as of that date and with its stock issued pro-rata to the partners in accordance with their interests in the assets, giving effect to the readjustment of such interests immediately prior to the

transfer to petitioner. (As concluded by the Tax Court.)

In each instance petitioner comes squarely within the statutory language. It is not even necessary to give that statute the broad and liberal interpretation to be accorded a remedial measure. It is not even necessary to consider that the equities are entirely with petitioner, that the earnings of the business during the base period are a fair and just standard of the normal earnings thereafter.

Respondent's argument is in part inconsistent. He argues that a partnership is not a juristic entity for the purposes of Section 740(a)(1)(D) or Section 112(b)(5) but he also urges that the properties required must be those *of the partnership* which was in existence prior to December 31, 1939. If a partnership is to have properties belonging to it, it must be an entity at least for that purpose. This was certainly the view of Congress when it wrote the statute and used the language:

“the properties *of a partnership*”

in Section 740(a)(1)(D).

In 1950 the Commissioner of Internal Revenue reversed his prior position to admit that a partnership is an entity separate and apart from its members, so that a sale by a partner of his partnership interest is a sale of a single capital asset, not a sale of his interest in each partnership asset.

G.C.M. 26379, 1950-1 C.B. 58.

This reversal accords with the position of the Tax Court and all Courts of Appeal which had passed on

the question (all but that for the First Circuit), many of which were cited and discussed in petitioner's brief—none in respondent's. *Section 51-3CCH page 3955.*

Once it is acceded that a partnership is an entity for one purpose, it can readily be appreciated it is not entirely a pluralistic concept. A change in membership does not necessarily create a new partnership.

Elder W. Marshall, 14 T.C. 90 affd. 185 F. (2d) 684 (C.A. 3, 1951);

Commissioner v. Sigvald Nielsen, 187 F. (2d) 233 (C.A. 9, 1951).

One of the most important things to note concerning the respondent's brief is negative. The respondent does not argue as the Tax Court erroneously concluded (without evidence, and contrary to the evidence):

“Here there was no intention that the partnership should continue.”

He relegates this conclusion of the Court to a footnote (Br. p. 17).

The evidence clearly discloses that Schnack withdrew on March 8, 1940, and under the agreement then made the remaining partners were to continue the partnership (at least until the business could be transferred to petitioner); that petitioner was not organized until six days after Schnack's withdrawal, and that the transfer of the *assets* to petitioner was not completed until April 1, 1940 (Tr. 34). During this interval of time, at least, there was an express agree-

ment to continue the business in partnership form and that agreement was followed.²

The interpretation that respondent gives to the opinion below makes more apparent sense than does that opinion (Br. 24). But from the foregoing reply to respondent's argument, coupled with his admission that the actual transfer was within Section 112(b)(5) it is clear that there never was any issue presented as to that section.

Respondent's position is that Section 112(b)(5) is an issue because (and only because) the partnership that had owned the assets went out of existence on March 8, 1940. This is apparent (though never fully stated) from his argument in general and in particular on page 24 of his brief where he admits the actual exchange was within the section.

But if this is true, the first point of inquiry must be, was there a termination of the partnership on March 8? If there was not, no 112(b)(5) problem exists. The respondent has admitted that this question was never reached by the Tax Court. Petitioner submits it has not been reached by respondent in his brief.

Respondent in no way points out the non-applicability of *Ransohoffs, Inc.*, 9 T.C. 376,³ which is on "all

²The Tax Court "presumed" that the business from March 8 was regarded as that of the corporation but stated its guess was not important (Tr. 50). The stipulated facts covered this point, especially paragraphs 13 (Tr. 37), 4 (Tr. 33) and 11 (Tr. 36), and Exhibit A-1 thereto (Tr. 37-39).

³A petition for review filed by the Commissioner in this Court was later dismissed and his prior non-acquiescence withdrawn, 1950-2 C.B. 4. Respondent has therefore acceded to that decision as being correct.

fours" with the petitioner's case except that there the change in partnership membership occurred by death rather than by withdrawal, with continuation provided in the partnership agreement rather than in a supplemental agreement between the partners. Actually, the instant case is stronger for the taxpayer than the *Ransohoffs* case. The issue in that case as stated by the Commissioner was

"Whether the partnership composed of Robert and James was actually in existence on August 1, 1936.⁴ This presents on the facts of the case a cold question of law—the law of partnerships, governed by the law of the State of California."

In the *Ransohoffs* case, there had been a number of changes in the partnership from three to four to three and, finally, to two members. On May 20, 1938, a new partnership agreement was actually drawn, involving three partners, one of whom died on October 9, 1938. Under agreement of the partners, the partnership was continued. The findings of fact and opinion in the *Ransohoffs* case were by the full Tax Court of sixteen judges and there was no dissent. The Court looked both to the law of California and to Federal Tax Statutes and cases and found that, at least for the remedial purposes of Supplement A, the *Ransohoff* partnership had had a continuous existence. That is exactly the situation presented in the instant proceedings.

⁴The applicable date in this proceeding is December 31, 1939. The principles involved are identical.

The respondent states that the case of *E. T. Renfro Drug Co. v. Commissioner*, 183 F. (2d) 846 (C.A. 5, 1950) is "on all fours" with the instant proceeding. While to us the strong dissent by Chief Judge Hutcheson is more persuasive and logical than the majority opinion, the case is by no means on all fours. It is clearly distinguishable on the following factors:

1. The law of the jurisdiction (Texas) apparently entailed a pluralistic concept of a partnership.
2. There were two major changes in the partnership, with Allen and Wren, both being eliminated as members.
3. This change was made several months before incorporation.
4. The managing partners were those that retired, the inactive investment partners remained.
5. There was no agreement or consent to continue the partnership.
6. There was a real issue on the question of whether "substantially all of the properties" were transferred.
7. There were several distinct partnerships and businesses involved.

Contrasted with the above, the instant proceeding involves:

1. Local law not only permitting but requiring partnership continuity until July, 1940, when the certificate of change was filed.
2. A single and minor change in the partnership interests.

3. This change was made shortly before incorporation.

4. No change was made in the management.

5. The partnership was continued by express agreement.

6. There is no issue on the "substantially all of the properties".

7. There is only a single partnership and business involved.

The Tax Court in deciding the *Renfro* case found the *Ransohoffs* case clearly distinguishable, and in particular emphasizes the Ransohoffs agreement that the partnership should continue.

E. T. Renfro Drug Co., 11 T.C. 994, 998.

So here does petitioner. That Court also emphasized the fact that of total assets of \$138,725 held by the Renfro partnership, \$63,000 of inventory and receivables *were not transferred* to the corporation. These were clearly business "properties" of the partnerships.

While the decision in the *Renfro* case may be regarded as debatable (certainly Judge Leech of the Tax Court and Chief Judge Hutcheson of the Court of Appeals for the Fifth Circuit so regard it) the decision in the *Ransohoffs* case is clearly sound and correct (as witnessed by the concurrence of the entire Tax Court, the dismissal of the Commissioner's petition for review, and his acquiescence in the decision).

Respondent has entirely failed to distinguish the *Ransohoffs* case, *supra*. The case herein presented is actually stronger than the *Ransohoffs* case:

1. The partnership withdrawal here was of a minority partner.

2. This partner took no part in partnership affairs.

3. Only one change was made in the partnership organization and no new agreement of partnership was made.

4. The continuity of the partnership was not only permitted it was required by local law and in far more direct and definite fashion.

5. All interested persons consented to the continuation of the partnership by Ballentyne and Leffel.

Under the law of Hawaii, a partnership is treated basically as an entity, far more so than under the Uniform Partnership Act involved in *Ransohoffs*, *supra*. The following quotations and notes from *Revised Laws of Hawaii 1945* establish this:

1. "The real property shall be assessed in its entirety to the owners thereof. * * *" *Sec. 5141*. "Property of a corporation or a partnership shall be assessed to it under its corporate or firm name." *Sec. 5142, Sec. 5637* (Personal Property Tax.)

2. "'Employer' shall include any individual, person, trust estate, decedent's estate, business trust, corporation, association, joint stock company, national bank, insurance company, partner-

ship or other entity * * *.” *Sec. 5342* (Compensation Tax).

See also *Section 5371* (Consumption Tax), *Section 5401* (Fuel Tax), *Section 5442* (Gross Income Tax), *Section 5514, 5525* (Income Tax).

Particularly pertinent is *Section 12015 of the Revised Laws* as adopted in 1937:

“Continuance of Partnership. When at the time of his death the decedent was a member of a partnership, and under the terms of the will of the decedent the executor is authorized to continue the business of the partnership or under the terms of the articles or agreement of partnership *provision is made for the continuance of the partnership* after the death of any partner or if it shall appear to the best interests of the estate, the executor or administrator may * * * *become or continue to be a special partner in the partnership* * * *.” (Emphasis supplied.)

Partnership interests, notes, etc., are securities and the partnership is clearly an entity with respect to issuance of such securities under the Hawaiian “Blue Sky Law”. *Sections 9101, 9107, 9111.* The last section refers to “changes in the personnel of a partnership” and “changes * * * in the copartners”.

Under the laws of Hawaii, Schnack was still technically a partner and fully liable as such until a certificate of change in membership or dissolution was filed. *Revised Laws of Hawaii, 1945, Sections 8604, 8605, 8609.* This was not done until July 2, 1940 (Tr. 122). Until then Schnack remained a partner but

his interest in the partnership or in the properties had no value after March 8, 1940. Leffel and Ballyntyne thereafter alone owned all partnership interests of value in equal shares and received petitioner's stock in equal shares for the properties of the partnership.

There was no new partnership, there was no joint proprietorship. There was a complete compliance with the statutory requirements—petitioner acquired “substantially all the properties of a partnership” in a transaction meeting the test of Section 112(b)(5) I.R.C.

II.

PETITIONER IS ENTITLED TO THE RETROACTIVE APPLICATION OF SECTION 740(a)(1)(D) FOR CREDIT CARRYOVER PURPOSES.

Respondent's argument on this issue is a recital of his regulations. He does not mention, however, his Regulation *T.D. 5391* as amended by *T.D. 5400* (See Appendix to Petitioner's Opening Brief). He does not mention the misleading acts of his agents on whom petitioner relied.

III.

THERE IS A REAL SUBSTANCE TO THE MISCELLANEOUS ERRORS OF THE TAX COURT.

A. Respondent states that the Tax Court summarized the facts in its opinion, but the Tax Court stated it made no findings other than “the facts as stipu-

lated are so found"; it expressly stated that it made no findings in its opinion (Tr. 87, 88, 113).

Respondent also is confused (Br. 24) as to what is a finding of basic fact and what is a conclusion of law.

B. Respondent asserts, but wholly fails to establish, that, principally, the statements of a factual nature by the Court have been distorted by petitioner. On this petitioner's counsel is content to stand on the record.

C. Petitioner accedes that the Tax Court *assumed* facts not in evidence, but contrary to all of the evidence if it did, as respondent states, assume that the transfer to petitioner was from the "Leffel-Ballentyne-Schnack" partnership with the interests of those partners then as they had been prior to March 8, 1940.

D. On this point respondent is quick to assert that what may have been completely illegal is a mere technicality. This reversal in respondent's position as to the importance of technicalities is somewhat amusing, but not entirely accurate. In addition to the factors mentioned in petitioner's brief (P. 53) Judge Van Fossan had heard and decided the *Ransohoffs* case, *supra*, a fact known to petitioners' counsel prior to the hearing, and was keenly aware of the close similarities presented (Tr. 72). They would not have escaped him as they did Judge Turner.

CONCLUSION.

Petitioner submits that the decision below is so clearly erroneous as to facts, law and procedure as to require reversal.

Dated, San Francisco, California,
December 28, 1951.

Respectfully submitted,

LOUIS JANIN,

HAROLD E. HAVEN,

MELVIN H. MORGAN,

Counsel for Petitioner.

No. 12,965

IN THE

United States Court of Appeals
For the Ninth Circuit

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A REHEARING.

LOUIS JANIN,
HAROLD E. HAVEN,
MELVIN H. MORGAN,
1105 Mills Tower, San Francisco 4, California,
Counsel for Petitioner.

FILED

JUN 4 1952

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No. 12,965

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The petitioner corporation, feeling that the Court in its opinion filed May 5, 1952, inadvertently made clearly erroneous statements of law of far-reaching effect, and resulting in a gross injustice to petitioner, respectfully petitions the Court for a rehearing.

The essence of the opinion may be summarized briefly as follows:

1. "Person" or "Persons" as used in Section 112(b)(5) means natural persons and does not include entities.

2. Therefore the purpose of incorporating Section 112(b)(5) into Section 740(a)(1)(D) was to restrict the latter section to partnerships in which no change of membership had occurred.

3. The concept of partnerships adopted by Congress is such that any change in membership terminates the partnership; this accords with the Uniform Partnership Act.

Each of these predicates is clearly and demonstrably an erroneous statement of existing law, contrary to the statutes involved and the overwhelming weight of case authority, including cases of this Court and of the Supreme Court.

1. **“PERSONS”, AS USED IN SECTION 112(b)(5), INCLUDES ENTITIES AS WELL AS NATURAL PERSONS.**

This proposition is so clear as to require little amplification. Section 3797(a)(1) I.R.C. expressly defines “persons” as including entities. Regulations 111, Sect. 29.112(b)(5)-1 provides:

“As used in Section 112(b)(5), the phrase ‘one or more persons’ includes individuals, trusts or estates, partnerships and corporations. (See Section 3797) * * *.”

In addition to the cases cited in petitioner’s reply brief, pages 6-7, see the opinion of this Court in *Halliburton, et al. v. Comm’r.*, 78 F. (2d) 265 (1935), involving an incorporation under 112(b)(5) by seven corporations and a partnership.

2. THE PURPOSE OF INCLUDING SECTION 112(b)(5) INTO SECTION 740(a)(1)(D) WAS NOT TO PRECLUDE CHANGES IN THE MEMBERSHIP OF A PARTNERSHIP; THE PURPOSE WAS TO EXCLUDE TAXABLE INCORPORATIONS.

As Section 112(b)(5) deals with entities as well as with individuals, there can be no implication from that section that an unimportant change in membership of a partnership was intended to prevent the application of Section 740(a)(1)(D). The obvious intendment of Section 740(a) was that tax-free incorporations (and only such) should qualify—all of the transactions specified are tax-free under various subdivisions of Section 112(b).¹ The necessary effect and obvious purpose of the requirement of a 112(b)(5) transaction is identical—the transfer to the corporation must be tax-free to qualify under Section 740(a)(1)(D).

The latter section nowhere refers to transfers *by the partners*; it nowhere refers to property *of the partners* used by the partnership: It refers only to *properties of a partnership*. This treats a partnership as something more than the group of individuals who are its

¹See *Siedman, Legislative History of Excess Profits Tax Laws* 271-273.

If the transaction were one in which gain or loss was recognized the need for the remedy would largely be dissipated—the corporation would have a stepped-up basis for the assets, including good will, acquired. If petitioner could include the actual value of its good will in March, 1940, in the measure of its invested capital credit, it would have little need for relief. It cannot do this because the incorporation was tax-free under Section 112(b)(5).

members. It is a business unit which, as such, has property which may be transferred to a corporation.²

-
3. THERE IS NO STATEMENT OF CONGRESSIONAL POLICY IN THE REVENUE CODE AND THERE IS NO PROVISION OF THE UNIFORM PARTNERSHIP ACT WHICH WOULD RESULT, UNDER THE CIRCUMSTANCES PRESENTED, IN TREATING HAWAIIAN FREIGHT ASSOCIATION AS A NEW PARTNERSHIP FOR THE PERIOD MARCH 8 TO MARCH 31, 1940, OR ANY PORTION THEREOF.

The Court's opinion (p. 5) concerning the statement of Congressional policy in the Internal Revenue Code is confusing. Sections 113(a)(13), 183, 187, 188, and 190 of that Code clearly treat a partnership as something different from its members. Under Section 3797(a)(2) it includes business organizations which are not trusts, estates or corporations. The fact that

²As stated by *Little, Federal Income Taxation of Partnerships*, p. 298:

"The courts generally agree that it is the partnership and not the individual partners who are the 'persons' transferring the assets and obtaining control of the corporation. Both the Court of Appeals for the District of Columbia and the Tax Court recognize the partnership as an entity for this purpose. In a somewhat surprising reversal of his usual insistence upon an application of the aggregate theory of partnerships, the Commissioner also apparently so recognizes the partnership.
* * *

In support, Little cites:

- Labrot v. Burnet*, 57 F. 2d 413 (C.A.D.C. 1932);
Sehtam Corp. v. Com., 125 F. 2d 655 (C.A. 2, 1942), affirming 44 B.T.A. 258;
Halliburton v. Com., 78 F. 2d 265 (C.A. 9, 1935);
Earle v. Com., 38 F. 2d 965 (C.A. 1, 1930), affirming 15 B.T.A. 668;
Kessler v. U. S., 124 F. 2d 152 (C.A. 3, 1941);
G. C. M. 11,557, XII-1 C.B. 128;
Schmiegl, Hungate and Kotzian, Inc., 27 B.T.A. 337.

Congress has expressly exempted partnerships as such from tax implies that partnerships would otherwise be taxed as such.

The case of *Heiner v. Mellon*, 304 U.S. 271, 58 Sup. Ct. 926 (1938) is distinctly in point on both phases of this problem. The Court there held (p. 929):³

“The fact that the partnerships had been dissolved by Fritz’s death before 1920 does not affect the liability of the Mellons as surviving partners for income taxes on their distributive shares of the net profits made in that year. * * * The business of A. Overholt & Co. did not terminate on Fritz’s death. Although dissolved, the partnerships and the business continued, since, as stated in the Pennsylvania Uniform Partnership Act: ‘On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.’ Throughout the year 1920 the business of selling stock on hand and deriving income therefrom was carried on precisely as it had been theretofore, and for the same purpose. * * *.”

In a leading case on the subject it was held that the death of an *inactive* partner holding only a 20% interest did not even cause a dissolution under the Uniform Act, let alone a termination.

Zeibak v. Nasser (1938), 12 Cal. (2d) 1, 82 P. (2d) 375.

³To understand this case it is necessary to appreciate that under the Regulations as the same then stood, a partner realized gain or loss on the termination of a partnership just as would a corporate shareholder on the liquidation of a corporation. The Mellons were contending that the old partnership had been terminated by the death of Fritz and a new partnership created, and that they were entitled to utilize as the cost to the new partnership the fair market value of the assets at the time of termination of the old partnership.

In *California Employment Stabilization Commission v. Walters* (1944), 64 Cal. App. (2d) 554, 149 P. (2d) 17, it was held that the status of the partnership continued, because of the agreement of the partners, notwithstanding the withdrawal of two of them. Rules similar to those have been applied in other jurisdictions under the Uniform Act.⁴

Following *Heiner v. Mellon, supra*, the Courts in Federal Income tax cases, until the present opinion here involved, have quite consistently held that changes in partnership membership did not terminate the existing partnership and create a new one where the partners had otherwise agreed and in substance "the firm" continued.⁵

Regs. 111 Sect. 29.113(a)(13)-2 contain language with respect to partnership reorganizations which is directly contrary to the Court's position. In at least two cases what purported and were intended to be new

⁴*Underdown v. Underdown* (1924), 279 Pa. St. 482, 124 A. 159; *Gerding v. Baier* (1923), 143 Md. 520, 122 A. 675.

⁵*Samuel Mnookin*, 12 T.C. 744 (1949), aff'd 184 F. 2d 89 (C.A. 8, 1950);

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Girard Trust Co. v. U. S., 182 F. 2d 921 (C.A. 3, 1950);

Henderson's Estate v. Com'r, 155 F. 2d 310 (C.A. 5, 1946);

Estate of Arron Lowenstein, 12 T.C. 694, aff'd sub nom. *First National Bank of Mobile, Ex'r v. Com'r*, 183 F. 2d 172 (C.A. 5, 1950);

Com'r v. Lehman, 165 F. 2d 383 (C.A. 2, 1948);

Ransohoff's, Inc., 9 T.C. 376;

Mary D. Walsh, 7 T.C. 205.

partnerships (following withdrawals) were held to be reorganizations of continuing partnerships.

Lester W. Fritz, 28 B.T.A. 408, affd. 76 F. (2d) 460 (C.A. 5, 1935);

Alphonso E. Bell Corp., B.T.A. Memo. Dec. C.C.H. No. 12585F (1942) aff'd on another point, 145 F. (2d) 157 (C.A. 9, 1944).

A holding that the old partnership was terminated and a new one created ignores substance and reality in favor of legal fictions not established as existing; it makes labels and characterizations that ignore the continuity of ownership by the firm, the continuity of the business of the firm under the same management until the corporation was organized and the firm assets transferred to it.

Lyeth v. Hoey, 305 U.S. 188, 59 S. Ct. 155, 159-160 (1938).

Petitioner concedes that in the case of a reorganization of a partnership such that either it or its continuing members have realized gain or loss for tax purposes, where there has actually or in real substance been a transfer from one firm to another, a new partnership has been created to succeed to the assets and continue the business. No such events here occurred. There was no transfer from an "old partnership" to a "new partnership"—an inactive partner ceased to have his financial interests—nothing more.

The petitioner acquired, through a tax free transfer, the assets, business and the management which had produced the prior profits and legally and equitably is entitled to use those profits as its standard of normal

earnings. The expressed policy of Congress in enacting the statute confirms this.

Dated, San Francisco, California,
June 4, 1952.

Respectfully submitted,

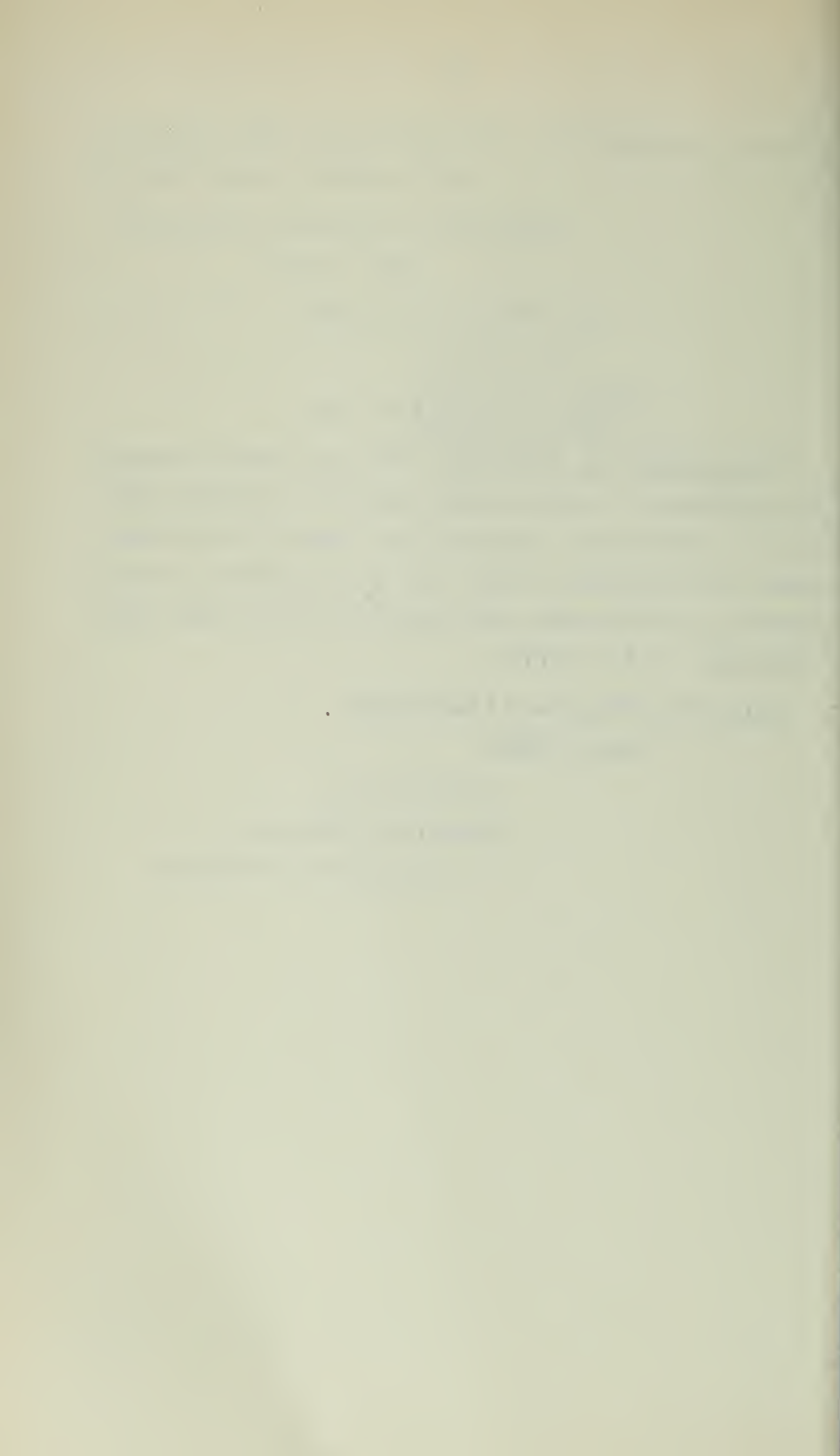
LOUIS JANIN,
HAROLD E. HAVEN,
MELVIN H. MORGAN,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

Louis Janin and Melvin H. Morgan, two of counsel for petitioner, hereby certify that the foregoing petition for rehearing (prepared by them) is not interposed for purposes of delay but, in the opinion of such counsel, is meritorious and entitled to the fullest consideration of the Court.

Dated, San Francisco, California,
June 4, 1952.

LOUIS JANIN,
MELVIN H. MORGAN,
Counsel for Petitioner.



No. 12966

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
ESTHER WESTFALL,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED
AUG 17 1951
U.S. DISTRICT COURT
CLERK

No. 12966

United States
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UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Western
District of Washington

Number 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendant alleges as follows:

I.

That jurisdiction of this action is conferred upon
this Court by the provisions of the Federal Tort
Claims Act, specifically Section 1346, et seq., Title
28, of the United States Code Annotated.

II.

That plaintiff is a resident of the City of Seattle,
State of Washington.

III.

That there is and at all times herein mentioned
was in full force and effect in the State of Wash-
ington the following statutes:

Pierce's Perpetual Code of the State of Wash-
ington, 1943:

Section 295-87. " 'Reckless' Manner Defined. It
shall be unlawful for any person to operate a motor
vehicle in a reckless manner over and along the

public highways of this state. For the purpose of this section to 'operate in a reckless manner' shall be construed to mean the operation of a vehicle upon the public highways of this state in such a manner as to indicate either a wilfull or wanton disregard for the safety of persons or property."

Section 295-89. " 'Negligent' Manner Defined. It shall be unlawful for any person to operate a motor vehicle in a negligent manner over and along the public highways of this state. For the purpose of this section to 'operate in a negligent manner' shall be construed to mean the operation of a vehicle upon the public highways of this state in such a manner as to endanger or be likely to endanger any persons or property. * * *"

Section 296-1. "Prudent Driving-Conditions. (1) Every person operating or driving a vehicle of any character upon the public highways of this state shall operate the same in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of the traffic, weight of vehicle, grade and width of highway, condition of surface and freedom of obstruction to view ahead and consistent with any and all conditions existing at the point of operation so as not to unduly or unreasonably endanger the life, limb, property or other rights of any person entitled to the use of such public highways;

"Lawful Speeds. (2) Subject to the provisions of subsection (1) of this section and except in those

instances where a lower maximum lawful speed is provided by this act or otherwise, it shall be unlawful for the operator of any vehicle to operate the same at a speed in excess of the following:

“Twenty-Five Miles. (a) Twenty-five (25) miles per hour within the limits of incorporated cities and towns; * * *

“Twenty Miles in Business Districts. (d) Twenty (20) miles per hour while traveling upon any public highway of any incorporated city or town and proceeding through any business district, when such business district is so sign posted at the extremities thereof;

“Fifty Miles Generally. (j) Fifty (50) miles per hour under all other circumstances.

“Care Always. Compliance with such speeds under the circumstances hereinabove set forth shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.

“Illegal Speed Prima Facie Reckless. The unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this section at the point of operation and under the circumstances described shall be prima facie evidence of the operation of a motor vehicle in a reckless manner by the operator thereof. * * *”

IV.

That there is and at all times herein mentioned was in full force and effect in the City of Tacoma, Washington, the following ordinances:

The Charter and Official Code of the City of Tacoma, Washington, 1948, Traffic Code, Number 101: Ordinance 11701, Adopted June 14, 1939:

“Section 5. Nothing in this ordinance shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injury to person or property resulting from the negligent use of the public streets by the driver or operator of any motor vehicle or its owner or his employee or agent, and the owner of such vehicle shall be equally liable for the negligent operation thereof, when at the time of such injury the vehicle was operated by the agent of such owner, or by any person employed by him for the purpose of operating such vehicle. * * *

“Section 8. Definitions. * * *

“(7) ‘Business District’—The territory contiguous to and including the public highway, as herein defined, when fifty per cent (50%) or more of the frontage thereon on either side thereof for a continuous distance of three hundred (300) feet or more is occupied by buildings in use for business. * * *

“Section 42. Lawful Speed, Care and Prudent Driving—(1) Every person operating or driving a vehicle of any character upon the public highways of the City of Tacoma shall operate the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of the traffic, weight of vehicle, grade and width of highway, con-

dition of surface and freedom of obstruction to view ahead and consistent with any and all conditions existing at the point of operation so as not to unduly or unreasonably endanger the life, limb, property or other rights of any person entitled to the use of such public highways; * * *

“(2) Subject to the provisions of subsection (1) of this section and except in those instances where a lower maximum lawful speed is provided by this ordinance or otherwise, it shall be unlawful for the operator of any vehicle to operate the same at a speed in excess of the following:

“(a) Twenty-five (25) miles per hour upon any public highway within the City of Tacoma. * * *

“(d) Twenty (20) miles per hour while traveling upon any public highway in the City of Tacoma and proceeding through any business district when such business district is so sign posted at the extremities thereof; * * *

“(f) Twenty-five (25) miles per hour under all other circumstances.

“Compliance with such speeds under the circumstances hereinabove set forth shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.

“The unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this section at the point of operation and under the circumstances described shall be prima facie evidence of the operation of a motor vehicle in a reckless manner by the operator thereof. * * *

“Section 80. Arterial Highways—(a) Those portions of the following streets are hereby designated as and declared to be arterial highways: * * *

“South Tacoma Way from South M Street to South City Limits * * *

“Section 120. Reckless Driving—It shall be unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of the City of Tacoma. For the purpose of this section to ‘operate in a reckless manner’ shall be construed to mean the operation of a vehicle upon the public highways of this city in such a manner as to indicate either a wilfull or wanton disregard for the safety of persons or property.

“Section 120-A. (Added by Ordinance No. 11783, passed March 6, 1940.) It shall be unlawful for any person to operate a motor vehicle in a negligent manner over and along the public streets of the City of Tacoma. For the purpose of this section to ‘operate in a negligent manner’ shall be construed to mean the operation of a vehicle upon the public streets of the City of Tacoma in such a manner as to endanger or be likely to endanger any persons or property * * *”

V.

That on February 20, 1946, at the hour of approximately eight o'clock p.m. plaintiff was a passenger in a certain United States Army bus belonging to the defendant, and being used at the time to transport plaintiff and others from Seattle to Fort Lewis, Washington, for the purpose of pro-

viding recreation by way of entertainment for members of the United States Military Forces stationed at Fort Lewis. That such services were provided pursuant to request therefor made by the appropriate military authorities of Fort Lewis to and through the United Service Organizations of Seattle, Washington. That at all times herein mentioned said bus was driven and operated by an agent and employee of the defendant, to wit: a soldier in the United States Army, whose name is unknown to plaintiff, but who was at all times referred to acting within the scope of his employment and agency. That at the time and on the date last indicated the said employee of defendant was driving said bus in a southerly direction on South Tacoma Way, approaching what this plaintiff believes and therefore alleges to be the intersection of South Tacoma Way and South Thirty-eighth Street, in the City of Tacoma, Washington, said route being otherwise designated as United States Highway Number 99, an Arterial Highway, and that said area is a business district, designated as such according to law. That said employee of defendant was driving said bus in a negligent, reckless and unlawful manner; at an excessive and unlawful rate of speed, to wit: in excess of fifty (50) miles per hour; that when coming to a point near the intersection above referred to the said employee negligently, recklessly and unlawfully applied the brakes on the said bus and forced it violently and suddenly to stop. All of which negligent, reckless and unlawful acts and omissions of the defendant by and through its em-

ployee and agent as aforesaid resulted in plaintiff's being thrown suddenly and with great force from the seat occupied by her on said bus to the floor and to the front thereof.

VI.

That as a direct and proximate result of the negligence of the defendant through its agent and employee as aforesaid the plaintiff suffered and sustained injuries and damages as follows: Severe and permanent injury to the back, lower spine, left leg and ankle, bruises, contusions and severe nervous shock. All of which resulted in continuous and severe pain and suffering to this plaintiff, becoming progressively worse, incapacitating plaintiff in the pursuit of her work and in earning a living, requiring continuous medical treatment, all to this plaintiff's general damage in the amount of Nine Thousand Seven Hundred and Fifty Dollars (\$9,750.00.)

VII.

That as a further proximate result of the negligence of the defendant through its agent and employee as aforesaid plaintiff has necessarily sustained special damages for expenditures for hospitalization and medical treatment in the total sum of Two Hundred and Fifty Dollars (\$250.00), all of which amounts are reasonable.

VIII.

That by reason of the negligence of the defenant through its agent and employee as aforesaid, and the injuries and damages proximately resulting

therefrom, plaintiff has been damaged in the total sum of Ten Thousand Dollars (\$10,000.00).

IX.

That the negligent and wrongful acts and omissions of the defendant through its agent and employee as aforesaid were contrary to the laws of the State of Washington and the ordinances of the City of Tacoma, in general, and of the parts thereof which are hereinabove set forth in particular, and the same were done under circumstances where the defendant, if a private person, would have been liable to the plaintiff for the injuries and damages proximately resulting therefrom.

Wherefore, plaintiff prays for judgment against the defendant in the sum of Ten Thousand Dollars (\$10,000.00), together with costs.

WILLIAM A. GRIFFIN,

MABEL B. GRIFFIN,

J. B. PENNINGTON,

By /s/ J. B. PENNINGTON,

Attorneys for Plaintiff.

State of Washington,
County of King—ss.

Esther Westfall, being first duly sworn, on oath deposes and says:

That she is the plaintiff in the above entitled action; that she has read the foregoing complaint.

knows the contents thereof, and believes the same to be true.

/s/ ESTHER WESTFALL,
Plaintiff.

Subscribed and sworn to before me this 18th day of April, 1950.

[Seal] /s/ MABEL B. GRIFFIN,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed April 21, 1950.

In the United States District Court of the Western
District of Washington, Northern Division
No. 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER

Comes now the defendant, United States of America, and for answer to the Complaint of the plaintiff, admits, denies and alleges as follows:

I.

Answering paragraph I of plaintiff's complaint, defendant admits the same.

II.

Answering paragraph II of plaintiff's complaint, defendant admits the same.

III.

Answering paragraph III of plaintiff's complaint, defendant alleges it does not have sufficient knowledge to form a belief as to the truth of the allegations therein contained and therefore denies the same.

IV.

Answering paragraph IV of plaintiff's complaint, defendant alleges it does not have sufficient knowledge to form a belief as to the truth of the allegations therein contained and therefore denies the same.

V.

Answering paragraph V of plaintiff's complaint, defendant admits plaintiff was a passenger on a bus being operated by an employee of the United States Army enroute to Fort Lewis on February 20, 1946, and further admits that at a point between the City of Tacoma and Fort Lewis, Washington, said bus came to a stop and the plaintiff fell from her seat and denies each and every other allegation contained therein.

VI.

Answering paragraph VI of plaintiff's complaint, defendant denies the same.

VII.

Answering paragraph VII of plaintiff's com-

plaint, defendant denies each and every allegation therein contained.

VIII.

Answering paragraph VIII of plaintiff's complaint, defendant denies each and every allegation therein contained.

IX.

Answering paragraph IX of plaintiff's complaint, defendant denies each and every allegation therein contained.

First Affirmative Defense

X.

That the proximate cause of plaintiff's injuries resulting from her fall from the seat to the floor of said bus was the negligence of the plaintiff.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff's action be dismissed and that defendant have judgment against the plaintiff for its costs and disbursements herein incurred, together with such other and further relief as the Court may deem just and equitable.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1950.

[Title of District Court and Cause.]

MOTION FOR ORDER DIRECTING
ISSUANCE OF SUBPOENA

Comes now the defendant herein by J. Charles Dennis, United States Attorney, and John F. Dore, Assistant United States Attorney for the Western District of Washington, and moves the above-entitled Court for an order directing the Clerk of the above-entitled Court to issue subpoena for the appearance of Joseph Yingling, 2600 Llewelyn St., Baltimore, Md., to testify in the above-entitled Court at the trial of the above-entitled cause on January 9, 1951, and directing the United States Marshal to pay the mileage and expenses allowed by law of said witness.

This motion is based upon the records and files herein and upon the annexed affidavit of J. Charles Dennis.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN F. DORE,
Assistant United States
Attorney.

United States of America
Western District of Washington
Northern Division—ss.

J. Charles Dennis, being first duly sworn, on oath, deposes and says: That he is United States Attorney for the Western District of Washington,

and as such makes this affidavit on behalf of the defendant herein, United States of America; That Joseph Yingling, 2600 Llewelyn Street, Baltimore, Maryland, is a necessary and material witness for the defendant, and that the defendants cannot safely go to trial without having this witness present and available to testify for the defense.

/s/ J. CHARLES DENNIS.

Subscribed and sworn to before me this 19th day of December, 1950.

[Seal] /s/ WILLIAM FERGUSON,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed December 19, 1950.

[Title of District Court and Cause.]

ORDER FOR SUBPOENA OF WITNESS AND PAYMENT OF FEES

This matter coming on upon motion and affidavit of J. Charles Dennis, United States Attorney for the Western District of Washington, and John F. Dore, Assistant United States Attorney for said District, and it appearing to the Court from said motion and affidavit and the records herein that the testimony of Joseph Yingling, 2600 Llewelyn Street, Baltimore, Maryland, is material and necessary at the trial of the above-entitled cause in the above-entitled Court on January 9, 1951, to be sub-

poenaed to appear January 8, 1951, at 10:00 a.m., and the Court being duly advised herein, it is hereby

Ordered that the Clerk of the United States District Court, Western District of Washington, Northern Division, issue subpoena directing the said witness hereinabove named to appear as a witness before the United States District Court for the Western District of Washington, Honorable John C. Bowen sitting, and to testify at the trial of the above-entitled cause, and called for that purpose; it is further

Ordered that the United States Marshal for the Western District of Washington be, and he hereby is, authorized to pay the necessary mileage and witness fees for the attendance of said witness hereinabove named at said trial.

Done in Open Court this 19th day of December, 1950.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

[Seal]: /s/ JOHN F. DORE,
Asst. United States Attorney.

[Endorsed]: Filed December 19, 1950.

[Title of District Court and Cause.]

MEMORANDUM

The rule is, as asserted by plaintiff, that a party must plead the statute of limitations in order to avail himself of that defense. But where, as here, the action is one which does not exist at common law and has its origin in a statute which conditions the right of action to its commencement within a limited period of time, the time specified is a part of the substantive right and not a procedural requirement. Statutes of creation affect the right and not merely the remedy. "The liability and remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right." *The Harrisburg*, 119 U.S. 199. Such is the situation in the instant case. As a part of plaintiff's burden she must show that her cause is within the grant to sue. That burden is not carried unless she establishes that her action has been brought within the time limit. *Mathey v. Porter*, 158 Fed. F. 2d 478.

The state statute of limitations is not applicable. The federal statute prescribes a limitation of its own to the exclusion of the state statute. *State of Md. v. United States*, 165 F. 2d 869.

This action was brought within the time specified in the Act. Section 240(b), Title 28 U.S.C.A. The 1949 Amendment, in effect at the time this action was commenced, was intended to revive such otherwise expired tort claims against the United States accruing on or after January 1, 1945. 1949 U.S. Code Cong. Service, p. 603.

Laches is an affirmative defense and must be plead. If not, it is not available. Rule 8(c); *Bergeron v. Mansour*, 152 F. 2d 27. Defendant draws its support for this defense from the evidence and this rule is particularly applicable where laches is not apparent from the face of the complaint. *La Vecchia v. First Nat. Bank of Tampa*, 112 F. 2d 145.

It is unnecessary that the compensation moving to the carrier consist of cash or its equivalent to distinguish the occupant of an automobile as a passenger. It may consist of some other "substantial benefit, recompense or return making it worth while for him to furnish the ride." 60 C.J.S. 1011, citing *Finn v. Dritna* (Wash.) 194 Pac 2d 347; *Engle v. Interstate Transit Co.*, 9 Wash. 2d 590 and *Scholz v. Leuer*, 7 Wash. 2d 76. The soldier had been directed by his superior officer to transport plaintiff and her troupe from Seattle to Ft. Lewis for the purpose of putting on an entertainment for the soldiers there stationed. The United States performs a duty to its armed forces when it affords recreation. Recreation is a part of the soldier's duty and within the scope of employment. *Murphey v. United States*, 179 F. 2d 743. I am satisfied that the facts here establish that plaintiff was a passenger and that the case is within the rule that where the operator or owner of the automobile is compensated in a substantial and material sense as distinguished from a social benefit the occupant is a passenger.

The Federal Tort Claims Act authorizes suits

upon a derivative claim and the Anti-Assignment Statute, 31 U.S.C.A. 203, does not forbid suit by a subrogee, assignee insurance carrier. *National American Fire Ins. Co. v. United States*, 171 F. 2d 206. Though by statute the subrogee may maintain an action for subrogation in his own name, he generally may not maintain the action in his own name if he is entitled to but a part only of the proceeds of a single cause of action. *Doleman v. Levine*, 295 U.S. 221. Where the loss exceeds the payment made by the insurer, the action not only must be brought in the name of the insured, but the insurer is not a necessary or a proper party. 29 Am. Jur. 1014.

Judgment will be for plaintiff in the sum of \$250.00 special and \$7500.00 general damages. Counsel for plaintiff will prepare and lodge findings of fact in accordance with this memorandum and the conclusions expressed by the Court at the submission of the case.

Dated: January 25, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed January 25, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial, pursuant to regular assignment, before the Honorable Dal M. Lemmon on the 9th day of January, 1951, the plaintiff being present in person and by her attorneys, William A. Griffin and J. B. Pennington, and the defendant by its attorneys, Vaughn E. Evans, and both parties having announced ready for trial, the court proceeded to hear the evidence of witnesses and argument of counsel. And the court, being fully advised, on consideration does make the following:

Findings of Fact

I.

Plaintiff's complaint was duly filed herein on the 21st day of April, 1950; summons issued; and, valid service thereof had upon the defendant. Defendant duly entered its appearance and filed its answer herein. The plaintiff is, and was at the time of filing her complaint and of the acts and things herein complained of, a resident of the City of Seattle, State of Washington.

II.

On February 20, 1946, at approximately eight o'clock p.m., plaintiff was a passenger on a certain United States Army Bus belonging to the defendant, and being used at the time to transport plain-

tiff and others as passengers therein from Seattle to Fort Lewis, Washington, for the purpose of providing recreation by way of entertainment for members of the United States Military Forces stationed at Fort Lewis, pursuant to request therefor by agents of the defendant, duly authorized and acting within the scope of their authority. The said bus was being driven by a soldier of the United States Army, pursuant to instructions from his superior officers, and he was acting within the scope of his authority and in the course of his employment as an employee of defendant. At a point near the intersection of South Tacoma Way and South Thirty-eighth Street in the City of Tacoma, Washington, while proceeding in a southerly direction, at the time mentioned, the said soldier drove the said bus negligently and at an excessive and negligent rate of speed and negligently applied the brakes on the said bus and negligently forced it violently and suddenly to stop. All of which negligent acts and omissions of the defendant by and through its agent, as aforesaid, was the proximate cause of and plaintiff was thrown suddenly and with great force from the seat occupied by her on said bus to the floor.

III.

As a direct and proximate result of the negligence of the defendant, through its agent as aforesaid, the plaintiff suffered injuries and damage as follows: Severe sprain of the lower back and left ankle, bruises, contusions and severe nervous shock.

These injuries resulted in continuous and severe pain and suffering to this plaintiff, necessitated frequent medical treatment for a period of approximately one year, and intermittent treatment thereafter. They have further occasioned a marked and permanent weakening of the plaintiff's lower back and left ankle ligaments and muscles. All of which have and will continue to interfere with and reduce plaintiff's capacity for the pursuit of her work and in earning a living. That as a further proximate result of the negligence of the defendant, as aforesaid, plaintiff has necessarily sustained special damages for expenditures for medical treatment and medicines in the total sum of Two Hundred and Fifty Dollars (\$250.00), all of which amounts are reasonable.

IV.

The negligent acts and omissions of the defendant, as aforesaid, were contrary to the laws of the State of Washington and the ordinances of the City of Tacoma, and the same were done under circumstances where the defendant, if a private person, would have been liable to the plaintiff for the injuries and damages proximately resulting therefrom.

V.

That by reason of the negligence of the defendant, as aforesaid, and the injuries and damages proximately resulting therefrom, plaintiff has sustained general damages in the sum of Seven Thousand five hundred dollars (\$7500.00), and special

damages in the sum of Two hundred and fifty dollars (\$250.00), or in the total sum of Seven thousand seven hundred and fifty dollars (\$7750.00).

VI.

That the said transportation of plaintiff from Seattle to Fort Lewis was as provided by defendant to plaintiff in consideration of and as a condition to the providing by plaintiff of the said entertainment for said military forces.

VII.

That fifteen percentum (15%) of the total sum recovered by the plaintiff herein is a reasonable attorney's fee to be allowed to the attorneys for the plaintiff herein to be allowed out of but not in addition to plaintiff's recovery herein.

Done in Open Court this 2nd day of February, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

From the foregoing Findings of Fact the court makes the following:

Conclusions of Law

I.

Jurisdiction of this cause of action is conferred upon this court by the provisions of the Federal Tort Claims Act, Section 1346, et seq., Title 28, of the United States Code Annotated.

II.

Plaintiff, Esther Westfall, is entitled to judgment against the defendant, the United States of America, by way of general damages in the sum of Seven thousand five hundred dollars (\$7,500.00.), and by way of special damages in the sum of Two hundred and fifty dollars (\$250.00), or in the total sum of Seven thousand seven hundred and fifty dollars (\$7,750.00) and her costs herein.

Done in Open Court this 2nd day of February, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed February 2, 1951.

In the United States District Court for the Western District of Washington, Northern Division

No. 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having come on for trial, pursuant to regular assignment, before the Honorable Dal M. Lemmon on the 9th day of January, 1951, the plaintiff being present in person and by her at-

torneys, William A. Griffin and J. B. Pennington, and the defendant by its attorney, Vaughn E. Evans, and both parties having announced ready for trial, the court proceeded to hear the evidence of witnesses and argument of counsel. And, the court having considered the evidence and record herein, been fully advised, and having heretofore made and entered its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff, Esther Westfall, do have and recover the amount of Seven thousand five hundred dollars (\$7,500.00), as general damages, and the sum of Two hundred and fifty dollars (\$250.00), as special damages, being in total sum of Seven thousand seven hundred and fifty dollars (\$7,750.00), and in addition thereto her costs herein, from the defendant, the United States of America, and that said counsel for plaintiff is awarded as attorneys' fees herein 15% of said \$7,750.00 to be paid out of but not in addition to said \$7,750.00.

Dated: February 2nd, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed and Entered February 2, 1951.

[Title of District Court and Cause.]

AMENDMENT TO MEMORANDUM

The sentence beginning with the word "where" in line 12 of page 3 of the Memorandum filed herein and ending with the numerals "1014" in line 16 of the same page is deleted and there is substituted in place thereof the following:

Under rule 17(a) of the Federal Rules an insurer who has paid only a part of the loss is a "party in interest" though not an indispensable party. *United States v. Aetna Casualty & Surety Company*, 338 U.S. 366.

Dated: February 5, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed February 5, 1951.

[Title of District Court and Cause.]

ORDER

Defendant has moved for a new trial, in support of which defendant advances the wholly tenuous argument that the court erred in announcing at the end of the trial certain conclusions without first inviting or permitting oral argument. The decision of the court upon the facts was not made until the findings of fact were signed and filed. The trial was completed on January 9th, 1951, and the find-

ings of fact were signed and lodged on February 2nd, 1951. If counsel for the defendant desired to more fully argue the facts they might have done so in the brief which was filed in the interval, or, if they entertained any misgivings as to whether it would have been permissible for them to do so, they should have at least requested permission, and, if they desired to orally argue the facts, they should have moved the court for leave to that end. Defendant's memorandum, filed on January 16th, 1951, does contain a comprehensive argument upon the questions of negligence, contributory negligence and proximate cause, an argument which is reiterated and re-emphasized in the brief in support of the pending motion. There is a complete absence of showing of abuse of the court's discretion.

Under the heading "Accident and surprise" counsel appear to contend that the defendant should be afforded a new trial because of surprise. In their language they state, "In all fairness the defendant should have an opportunity to make additional investigation and present additional evidence tending to prove that the driver from Baltimore was in fact the driver of the bus involved in this instance." But there is no showing that such evidence is available or can later be produced. No continuance was sought to meet the unexpected circumstance. The surprise here claimed does not therefore support the motion. *Ruedy v. Town of White Salmon, D. C., Wash.*, 35 F. Supp. 130, and cases cited therein.

The matter of damage has been heretofore fully

considered by the court as has also the claimed errors in law.

Defendant's motion for a new trial is denied.

Dated: March 19th, 1951.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed March 22, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Esther Westfall, plaintiff herein, and to William A. Griffin and Mabel B. Griffin and J. B. Pennington, her attorneys:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in the above court on the 25th day of January, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney.

Copy mailed.

[Endorsed]: Filed March 23, 1951.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR
DOCKETING RECORD ON APPEAL

Comes now the defendant, United States of America, and pursuant to Rule 73g, Federal Rules of Civil Procedure, moves the Court for an order extending the time to file with the United States Court of Appeals for the Ninth Circuit, the record on appeal in the above-entitled cause to and including Monday, June 11, 1951, which date is the 80th day from the date of filing the notice of appeal in the said cause.

This motion is based upon all files, records and proceedings herein and upon the affidavit of Merritt G. Dyer, attached hereto.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant United States
Attorney.

AFFIDAVIT

State of Washington,
County of King—ss.

Merritt G. Dyer, being first duly sworn, upon oath deposes and says:

That he was the reporter who reported the above-entitled cause; that he will be unable to prepare the transcript of the record in the above-entitled cause

within the 40 days allowed for the reason that he is in the process of preparing two other transcripts which will run approximately 600 pages each, and further that the affiant has been a reporter in Judge Peirson M. Hall's court during the past week which has materially reduced the time which he would have available for the preparation of the transcript;

That this affiant believes and therefore states that he can complete said transcript by June 11, 1951, giving allowance for unforeseen emergencies which may arise in the future; that this affiant will diligently prepare such transcript as rapidly as possible.

/s/ MERRITT G. DYER.

Subscribed and sworn to before me this 13th day of April, 1951.

[Seal]: /s/ J. CHARLES DENNIS,
Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
DOCKETING RECORD ON APPEAL

On motion of the defendant, United States of America, the Court having considered the affidavit of Merritt G. Dyer in support of the motion, it is hereby

Ordered that the time for docketing the record on appeal in this cause in the United States Court of Appeals for the Ninth Circuit be and it is hereby extended to and including Monday, June 11, 1951.

Done in Open Court this 17th day of April, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed April 17, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Before: The Honorable Dal M. Lemmon,
District Judge.

January 9, 1951—10:00 o'Clock A.M.

Appearances:

WILLIAM A. GRIFFIN, ESQ., and

J. B. PENNINGTON, ESQ.,

Appeared on behalf of the Plaintiff;

VAUGHN E. EVANS, ESQ.,

Assistant United States Attorney,

Appeared on behalf of the Defendant.

Whereupon, the following proceedings were had
and testimony taken, to-wit:

ESTHER WESTFALL

the plaintiff herein, called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

* * *

Q. You were a resident of Seattle at the time of the accident for which this action is brought?

A. Yes. [3*]

* * *

Q. Were you involved in an accident on February 20, 1946? A. Yes, I was.

Q. What kind of an accident was this?

A. We were en route from Seattle to Fort Lewis to give a USO performance at a service club out at Fort Lewis.

Q. When this accident occurred?

A. Yes.

Q. What kind of a vehicle were you in or traveling on? A. We were in an Army bus.

Q. Who was driving this bus?

A. A soldier in the Army.

Q. How did you know he was a soldier, Mrs. Westfall? A. Well, he was in uniform.

Q. Was he sent to Seattle for the purpose of bringing this troupe to Fort Lewis?

A. Yes. [4]

* * *

Q. Where were you going at the time you boarded this bus?

(Testimony of Esther Westfall.)

A. We were going to Fort Lewis to do a [5] show.

* * *

Q. You left Seattle, then, en route to Fort Lewis?

A. Yes.

Q. Where, Mrs. Westfall, on this bus, were you seated during this trip to Fort Lewis?

A. I was sitting in a seat—there is a double seat in back of the driver's seat and I was sitting next to the wall of the bus and the windows.

Q. By a double seat, do you mean designed to accommodate two people?

A. To accommodate two, yes.

Q. Was there anybody seated on that seat with you?

A. No.

Q. Will you explain to the Court what if anything happened to you during this trip to Fort Lewis?

A. On the trip to Fort Lewis a light turned red and the driver slammed on his brakes, and I was thrown from the seat to the floor, and my full weight landed on my left leg and ankle; and in falling I was twisted so that my back was injured, too.

Q. Where did this occur, Mrs. Westfall?

A. It occurred at 38th and Highway 99 just as you make [6] your entrance to South Tacoma business district.

* * *

Q. And you know that to be within the city limits of the City of Tacoma?

A. Yes, it is. [7]

* * *

(Testimony of Esther Westfall.)

Q. When you approached the particular intersection of 38th and U. S. 99 where this accident occurred, can you estimate the speed at which this bus was traveling; that is, as he approached this light at that intersection?

A. I would judge he was driving between 50 and 60 miles practically all the way. [10]

* * *

Q. Can you estimate for us his distance from the light at the time it changed as he approached the intersection?

A. Well, I would say he was about 50 feet from the light—maybe a little bit further back—when the light turned red. [12]

* * *

Q. Mrs. Westfall, what was your general physical condition and health prior to the time of this accident?

A. Well, I have always been very healthy; hardly ever ill in my life.

Q. Have you had any trouble with your back or your leg?

A. Oh, I have had trouble with my back and leg ever since. It bothers me all of the time.

Q. Before the accident, I mean.

A. No, I haven't.

Q. And you say you have continued to suffer pain in your leg and back as a result of the injury sustained in this accident?

A. Yes, they bother me all the time.

(Testimony of Esther Westfall.)

Q. What effect, if any, Mrs. Westfall, have these injuries had with respect to your work or your ability to earn a living?

A. Well, my salaries haven't been as high as they were before and I have had to change the line of work so that I could adjust the time that I had to be on my feet to the way I felt.

Q. Were you working at the time of the accident?
A. Yes, I was.

Q. May I ask if you continued to work thereafter?

A. Yes, I did. I was in bed three days after the accident. [15] I went back to work the fourth day; although I didn't feel like it, I had to.

Q. Did you go to a doctor after this accident, Mrs. Westfall?

A. I went to the doctor the next day.

Q. That was on February 21, 1946?

A. Yes, it was.

Q. And what doctor did you go to?

A. I went to Dr. Seering in the Medical Security.

Q. Will you explain to the Court what treatment you received by the doctor; did he examine you at that time?

A. Yes. Dr. Seering examined me and he X-rayed my back and my ankle. He couldn't find any break at all. I took physio-therapy treatments. I had a physio-therapy treatment before I went home that evening, and he wrapped my ankle and leg.

(Testimony of Esther Westfall.)

Q. Did you continue to wear support on your ankle and leg after that?

A. Yes. I wore it wrapped for months. I took physio-therapy treatments at first every other day on my back and leg, and then twice a week.

Q. For how long a period of time, Mrs. Westfall?

A. I believe it was June, 1947. [16]

* * *

Q. When you stated, Mrs. Westfall, that the X-rays revealed no breaks, you had reference to bones? A. Bone breakage, yes.

Q. What did Dr. Seering advise you was the nature of the injuries?

A. Dr. Seering told me it was a very, very bad sprain. He said that it would have been a lot better if my ankle had been broken instead of sprained the way it was; that it would continue giving me trouble.

Q. What did he say with reference to your back?

A. Well, he said my back was badly [17] sprained.

* * *

Q. What type of work were you doing at the time, Mrs. Westfall?

A. At that time I was doing substitute teaching in the Seattle schools.

Q. For how long did you continue to do that?

A. Well, I continued substituting the balance of that year. [18]

* * *

(Testimony of Esther Westfall.)

Q. How long did you continue to work as substitute teacher?

A. I continued with the substitute teaching the balance of that year—until June.

Q. Did these injuries which you sustained interfere with your teaching or your work?

A. Well, of course, it made it difficult because my ankle and back bothered me all the time but I would go and teach whenever they called me because I just had to make every dime that I could.

Q. Did you ever have to ask for any special consideration due to the condition of your ankle and back?

A. Well, immediately following the accident I was at the Latona School. The principal was very lovely to me and told me to stay off my feet just as much as I possibly could, and I didn't have to take any duties.

Q. What did you do, Mrs. Westfall, after this period of substitute teaching; what was your next employment?

A. I went back to work at Boeing's. [19]

Q. What was the nature of your work there?

A. I was a key punch operator.

Q. Will you state whether or not and how your physical condition affected your work there?

A. Well, of course, anyone that works at Boeings—you have to do a lot of walking in order to get in and out of the plant. Of course, after I got in and to work I was seated practically all the time so that I wasn't on my feet. But in going in and going out, it was a considerable distance to

(Testimony of Esther Westfall.)

walk and my ankle and leg and back bothered me all of the time; and my ankle would just swell until I would think it would burst.

Q. How long did you continue to work there, Mrs. Westfall?

A. I worked there until about August of the following year.

Q. What was your usual wage during that period?

A. I made \$1.10 an hour, which amounted to around \$40 to \$45 a week.

Q. Will you state why you left this employment?

A. Well, I decided to take up selling because in that way if my leg and back bothered me too much I wouldn't have to go out; so I sold Stanley Home Products for about a year.

Q. Following your employment at Boeings——

A. Yes. [20]

Q. ——you sold Stanley Products for about one year. And what were your earnings during this period?

A. I judge about \$150 a month, approximately.

Q. Was it on a commission basis?

A. Yes, it was on a straight commission.

Q. What were your working hours or working schedule during this period of selling?

A. Well, you set your hours and time to suit yourself.

Q. Do you arrange your own appointments——

A. Yes.

(Testimony of Esther Westfall.)

Q. ———at whatever time you see fit?

A. Yes.

Q. And was it necessary for you to do a great deal of walking in connection with this?

A. No. If I could have done a great deal of walking I could have made much more money, but my ankle wouldn't permit me to get out and do much more walking.

Q. How would you get to and from your appointments or where were they made?

A. My appointments were made in the homes and I drove to and from them in my car.

Q. And you did this work for about one year until when?

A. Until November in 1948.

Q. What did you do after that, Mrs. Westfall?

A. I accepted a teaching position at Vashon Island. [21]

Q. What was the reason for accepting this position?

A. Well, I thought possibly that my ankle and back wouldn't interfere too much, and a teaching position is a steady monthly salary.

Q. Did it provide more income than your previous work of selling?

A. Yes, it did.

Q. About how much income did you derive from this teaching?

A. I think my monthly salary was \$212 a month without your tax deductions.

(Testimony of Esther Westfall.)

Q. Did your leg and back injuries interfere with you during this period?

A. They bothered me all of the time. Every night when I came home my ankle was very terribly swollen, and my back bothered me and made me cross and irritable.

Q. How long did you continue to teach during this period, Mrs. Westfall?

A. I taught from November until June of 1949.

Q. Did you teach any after that?

A. No.

Q. Have you ever taught any since?

A. I think I substituted a few days last year, and that is all.

Q. May I ask, Mrs. Westfall, if the reason why you have [22] not taught has any connection whatever with the condition of your ankle and back; did that enter into the reason for you discontinuing your teaching activities?

A. Well, yes, it did, because when you are teaching you have to be on your feet a considerable amount of time. You can't teach school and sit at your desk all of the time; it is impossible.

Q. Very well. Then what did you do after that, Mrs. Westfall?

A. I started selling Real Silk Hosiery.

Q. You went back to selling?

A. Yes, I did.

Q. For what reason?

A. Because you can set your time according to the way that you feel.

(Testimony of Esther Westfall.)

Q. After you stopped teaching in June, did you go immediately into selling?

A. No, I didn't. I went to school and got my B.A. degree. I went to school four weeks.

Q. What did you do after that?

A. Then I rested the rest of the summer.

Q. When did you go back into selling?

A. I started selling Real Silk in October of 1949. [23]

* * *

Q. And you went back into selling Real Silk products, I believe you stated?

A. Yes, I did.

Q. In the fall of 1949? A. Yes. [24]

Q. And how long have you been working at that?

A. Well, since 1949. I am still working at it.

Q. You are still doing that kind of work, selling? A. Yes, I am.

Q. Your income is determined on a commission basis? A. Yes, it is.

Q. About what has your income averaged during the period of time since the fall of 1949?

A. Well, I would say, taking a balance of the whole thing, it would average, I would say, about \$150 a month; it might be a little more.

* * *

Q. Do you think that your injuries in any way interfere with the extent to which you are able to earn income from your selling activities?

A. Yes, I do; because if I could be on my feet more, why, you could make many more sales. [25]

(Testimony of Esther Westfall.)

* * *

Q. I would like for you to state, Mrs. Westfall, whether or not the condition of your leg and back is one of the reasons or the reason—or however you would characterize it—why you find it necessary to stay in the selling field instead of working at the kind of employment you were previously engaged in?

A. Well, when you are working on a steady day-to-day job you have to be on the job or take a chance on losing the position. With selling and working on a straight commission, it is up to you. If you are unable to go out, why, you don't [26] have to.

* * *

Q. What expenses have you incurred, Mrs. Westfall, in connection with your examinations and treatments due to these injuries?

A. Well, I had my doctor bills and my treatments. I think Dr. Seering's bill was \$114 and something; and Dr. Lindahl's was \$20 for the X-ray and Dr. Sprecher's was \$15. And then, of course, during the course of the years, why, I spent around \$150 for medicines and salves and things like that, alcohol.

Q. Dr. Seering is connected with the Medical Security Clinic, is that not true? A. Yes.

Q. Did you hold a policy in that clinic which provided for certain medical treatments and so on?

A. Yes, I did.

Q. What was the nature of that policy and how much consideration did you pay for it?

(Testimony of Esther Westfall.)

A. Well, your Medical Clinic costs you \$3 a month, and that included doctors and treatments and medicine and things. Of course, the other medicine, like rubbing alcohol and liniments and aspirin and Alka-Seltzer and different things like that and bandages, I bought at the drug stores. [31]

Q. How long had you held this policy?

A. Well, I took it when I first went to work at Boeing's in 1943.

Q. 1943. And you held it until when?

A. I think it was 1948.

Q. What did that policy cost you?

A. \$3 a month. [32]

* * *

Cross-Examination

By Mr. Evans:

* * *

Q. The doctor bills were all paid by the insurance company? A. Not all of them, no.

Q. What doctor bills were paid by the insurance company?

A. The doctor bills under the Medical Security Clinic.

Q. What doctor bills were they?

A. That was Dr. Seering.

Q. Dr. Seering. Any other doctor bills?

A. No. It was those up there that were [33] paid.

* * *

Q. (By Mr. Evans): So you didn't have to pay that money?

(Testimony of Esther Westfall.)

A. I paid my \$3 a month and have continued to do so for almost five years.

* * *

Q. But they did pay all of Dr. Seering's bill?

A. That was paid out of my monthly [34] payment.

* * *

Q. How much did you weigh at the time of the accident?

A. I weighed approximately 256 pounds.

Q. How long have you maintained weight at that?

A. I had weighed that since about 1940.

Q. How much do you weigh now?

A. I weigh about 175 pounds.

Q. How long has it been since you had any weight that approached 256 pounds?

A. I have been losing weight for about two years now. Both Dr. Seering and Dr. Lindahl told me that if I weren't so heavy possibly my ankle wouldn't bother me as much.

Q. Well, you were still weighing approximately 250 pounds in 1949 and the summer of 1949?

A. No, I didn't weigh quite that the summer of '49.

Q. Well, the summer of 1949 about how much did you weigh?

A. I believe I weighed 220 pounds. [35]

* * *

Q. When you were in the seat directly—the first seat immediately behind the driver?

(Testimony of Esther Westfall.)

A. I was in the first seat immediately back of the driver. But the driver's seat was on this side and I was sitting over on this side. [36]

Q. In other words, as I understand, the driver was more towards the center line of the axis of the bus than you were towards the left-hand side of the bus?

A. Well, I was right over against the wall of the bus.

Q. Would that be the left-hand wall?

A. That would be the left-hand wall of the bus.

Q. Was there anyone else on the seat beside you there? A. No, I was sitting alone. [37]

* * *

Q. Were you sitting in such a position where you could see the speedometer on the bus?

A. No, I couldn't see the speedometer on the bus. [38]

* * *

Q. Did you limp for several days thereafter?

A. Well, I limped for months afterwards.

Q. Noticeably?

A. Well, sometimes it was more noticeable than others.

Q. A person couldn't be around you very long without noticing the limp, could they?

A. No. They would notice the limp and they would notice how my ankle was swelled.

Q. That is, most any casual observer who was around you would have been able to observe that?

A. I have had many people ask me——

Q. Just answer the question: Would any cas-

(Testimony of Esther Westfall.)

Q. A. observer who was around you have noticed your disability in that regard?

A. Yes; most everybody did. [41]

Q. As I understand, you were working at the Latona School as a substitute teacher at the time of this accident? A. Yes.

Q. You had been working at Latona School all during that month of February up until the time of the accident, is that correct?

A. I think I went there the first of February.

Q. Do you recall what day of the week the 20th day of February came on?

A. It was on Wednesday.

Q. And the 21st then would have been Thursday? A. Yes.

Q. And the following day would have been the 22nd which was Washington's Birthday, is that correct? A. Yes, it was.

Q. Now, Washington's Birthday would have been a school holiday? A. It was.

Q. But the 21st would not have been a holiday?

A. No, it wasn't.

Q. Do I understand that you are advising the Court now that you did not go to work on the 21st day of February, 1946?

A. No, I never said I didn't go to work. I said I went [42] to work the next day after the accident and school was out at 2:00 o'clock that day and I went immediately to the doctor's office.

Q. Then you did go to work?

A. Yes, I did.

(Testimony of Esther Westfall.)

Q. And you did not immediately go home and go to bed for three days then, is that correct?

A. I said I went to work the following day—the following morning—because school was not in session all day. And I went to the doctor just as soon as school was dismissed. From the doctor's office I went home and went to bed and I was in bed for three days.

* * *

Q. Monday you were back at work?

A. I went back to work on Monday, yes.

Q. And continued to teach for the rest of the week?

A. Yes, I did. However, it wasn't a pleasant job; when you are suffering and hobbling around and have your leg and ankle wrapped, why, it is not an easy thing to do.

Q. But you did teach?

A. I did, yes. I have worked many times when I really had no business working.

Q. And you continued to teach as a substitute teacher off [43] and on for the rest of that school year?

A. Yes, I did.

Q. Now, that would have been through the school year of 1946?

A. Yes.

Q. Then in July or August you were hired at Boeing's?

A. I was rehired—called back to Boeing's.

Q. And you worked there for approximately a year?

A. Yes, I did.

Q. And you earned \$1.10 an hour there?

A. Yes, I did.

(Testimony of Esther Westfall.)

Q. You worked how many hours a day?

A. Eight hours.

Q. That is a normal day's work, isn't it?

A. Yes, it is.

Q. During that period of time, you weighed approximately around 250 pounds?

A. Yes, I did.

Q. I didn't quite get it straight what employment you took at the conclusion of your employment at Boeing's.

A. I took up selling Stanley Home Products.

Q. What are Stanley Home Products?

A. They are cleaning chemicals.

Q. What do you mean by cleaning chemicals?

A. Floor wax, floor cleaner, silver cleaner, silver polish, [44] metal polish. And then they had a number of different brushes and things.

Q. How did you go about selling these items; did you have a store somewhere?

A. No. We booked parties at private homes and put on parties and demonstrated the chemicals and took orders.

Q. You would hire somebody to go along with you to put on these demonstrations?

A. I put on the demonstrations.

Q. You put on the demonstrations. Then you continued that until sometime in November of 1948, did I understand you to say? A. Yes, I did.

Q. At that time you went to work for Vashon?

A. Teaching school.

Q. As I understand, you were in all of this pain

(Testimony of Esther Westfall.)

at this time and considered yourself physically disabled?

A. Well, I was suffering all of the time.

Q. You didn't consider yourself physically disabled?

A. Well, I couldn't consider myself physically disabled because I had to make a living.

Q. Then it is my understanding that you do not now consider yourself physically disabled?

A. I don't consider myself a total invalid, [45] no.

* * *

Q. Then you do consider that you are disabled?

A. Yes, I was disabled.

Q. Now, do you consider yourself disabled?

A. I don't know just in what sense you mean for me to call myself disabled.

Q. You have started this lawsuit to collect \$10,000 from the government and it is my understanding that you consider yourself disabled; now, are you or are you not disabled at this time?

A. I have been disabled to the extent that it has caused my income to be lower; and I suffer intense pain all of the time.

* * *

Q. (By Mr. Evans): Mrs. Westfall, I don't believe I caught [46] your age on direct examination; how old are you now? A. I am 45.

The Court: That means you were 41 at the time of the accident? What is the date of your birthday?

The Witness: August 13th. I was born in 1905.

(Testimony of Esther Westfall.)

Q. (By Mr. Evans): Do I understand that this disability that you speak of has caused you to have a limp due to your swollen ankles and the soreness in your leg? A. A slight limp.

Q. If anybody was around you for any period of time, they would notice that? A. Yes.

Q. It is my understanding that your reason for discontinuing your teaching occupation was because of this injury?

A. Yes. I could have the time to—if I didn't feel like going out, I could stay at home.

Q. So, as I understand, you want the Court to believe that your reason for discontinuing the teaching profession is because of this injury, is that correct or not? A. Yes.

Q. Mrs. Westfall, isn't it a fact that in June of 1949 you applied to the Seattle Public Schools for a job as a permanent teacher?

A. Yes, I did put my application in. [47]

Q. Isn't it a fact that you renewed that application in March of 1950? A. Yes.

Q. You were not employed?

A. No, I wasn't.

Q. No offer of employment was made?

A. No.

Q. So that is in truth the fact why you discontinued your teaching profession, is that you couldn't be employed, isn't that correct?

A. I could have been employed but not in Seattle.

Q. Seattle is your home? A. Yes.

Q. Seattle is where you would have preferred to teach, isn't that correct? A. Yes, it was.

(Testimony of Esther Westfall.)

Q. In regard to your being employed selling Real Silk hosiery, what type of selling was that; were you in a store somewhere? A. No.

Q. What kind of selling did you have to do?

A. That is contacting private individuals.

Q. House to house canvassing?

A. Some of it is house to house canvassing.

Q. As a practical matter, that is about the only way [48] Real Silk hosiery salesmen make a living, is to make a house to house canvass, isn't that correct?

A. Yes; unless you have a clientele of people you can call on and make appointments and go and see.

Q. You had no such clientele, did you?

A. Well, I know a lot of people.

Q. But you made quite a bit of house to house canvassing?

A. Yes, I have made some house to house canvassing.

Q. And this was during 1949? A. Yes.

Q. This U S O show that you were putting on down there, were you paid for your services?

A. No, we were never paid.

Q. Why were you doing this work?

A. We were doing volunteer service entertaining the boys that were at the different camps.

Q. It was entirely voluntary, then?

A. Yes, it was.

Q. How about your performers, were they paid?

A. No, they weren't.

Q. Everybody was voluntary?

A. Everyone was voluntary.

(Testimony of Esther Westfall.)

Q. What was the general age bracket of the performers that you had in your show?

A. Well, Beverly was, I believe, 10 or 11 when she started [49] in. She was the youngest regular member of our troupe. At times I did take some smaller group of youngsters out to Fort Lawton. I never did take any of the younger ones to Fort Lewis.

Q. On this particular trip what was the general age bracket?

A. From 11 to 18 or 19. Of course, Mrs. Bruck was our pianist and she was older, and I myself was older.

Q. How many adults were along on this trip?

A. Well, Mrs. Bruck and Mrs. Holloway and myself; there were three of us adults on the trip. Of course, your bus driver.

* * *

Q. Well, you in no sense considered yourself as the chaperon of these children, did you?

A. Well, I was in charge of the troupe. A person being in charge would in a certain respect be considered a chaperon.

Q. Were you performing any such function?

A. Yes, I was. [50]

* * *

Q. Well, you would certainly never permit your daughters to go out on a trip such as this without some adult along as a chaperon?

A. No, I wouldn't.

(Testimony of Esther Westfall.)

Q. Nor would any of the other mothers?

A. No.

Q. From your observation did the members of your troupe, the entertainers, derive any enjoyment or pleasure out of this sort of an activity?

A. They enjoyed performing before an audience, yes.

Q. There was no compulsion on the part of anybody to go on any of these trips, was there?

A. No.

Q. If somebody didn't want to go, they didn't have to?

A. They didn't have to, no.

Q. You could have refused to go, yourself——

A. Yes, I could have.

Q. ——or any other member of your troupe. The parents of these children, I presume, more or less sanctioned the children going on these voluntary trips?

A. Yes, they did.

Q. On this type of entertainment and this work you were doing, did the Army and the Navy always furnish transportation? [51]

A. Yes, they always furnished transportation.

Q. Even when you might put on shows at Fort Lawton, they would always furnish transportation?

A. When we put on shows at Fort Lawton they furnished the transportation. When we put on shows downtown at the U S O Club, down on Second and Spring, we furnished our own transportation to get down there.

Q. Before or after the show was over was there

(Testimony of Esther Westfall.)

any sort of a social gathering where you and your troupe would meet the people at the Post or your audience?

A. Usually they would furnish some kind of refreshments—sandwiches and cokes or something like that.

Q. Sort of a small party, I gather?

A. Well, it wasn't exactly a party, no. Sometimes we took our sandwiches and got on the bus and left.

Q. But at the times when you would stay there would be a small gathering of some sort?

A. Well, it would just be with the hostess and our own group.

Q. As I understand this sudden stop which you say the bus made, there was no accident or collision or anything like that?

A. No, there wasn't except I was thrown off the seat. [52]

* * *

(Photograph marked as Defendant's Exhibit A for identification.)

(Photograph marked as Defendant's Exhibit B for identification.)

(Photograph marked as Defendant's Exhibit C for identification.)

The Court: Counsel inquires as to what the pictures represent.

Mr. Evans: I intend to allow the witness to see whether or not she can identify them.

(Testimony of Esther Westfall.)

The Court: Before any questions are asked of the witness concerning them, opposing counsel may see the pictures.

Mr. Pennington: It is my understanding, your Honor, that they are being submitted to the witness [53] for the purpose of identification only and are not being offered in evidence.

The Court: They are being offered for the purpose of identification only at the present time. They have not been offered in evidence.

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibits A, B, and C, would you look at those and state generally whether or not you can identify what is depicted in those pictures?

A. Well, it looks like the inside of a bus, the left-hand side.

Q. From your memory of the particular bus you were riding on at the time, can you state whether or not those pictures in any way resemble the interior of the bus in which you were riding?

A. Well, none of these is a picture of the bus that I was on; definitely not.

Q. You are certain they are not a picture of the bus that you were riding in? A. Positively.

Q. Is there any similarity between the scene there and the bus that you were riding on?

A. Well, the only similarity is that there is this single seat here, and the double seat in back. [54]

Q. The single seat you are referring to is what we would normally consider as the driver's seat?

(Testimony of Esther Westfall.)

A. The driver's seat, yes.

Q. And the seat in back of the driver's seat, does that in any way resemble the seat upon which you were sitting at the time of this accident you speak of?

A. It would approximately be in the same position as the seat I was sitting on.

Q. How about the railing around behind the driver?

A. There was no railing on the bus that we were on.

Q. You are certain of that?

A. I am positive of it.

Q. What was your position on this seat; were you sitting with your back up against the back of the seat or were you sitting with your back towards the outside wall?

A. I was sitting with my back up against the back of the seat, next to the wall. [55]

* * *

Q. Except for the rails behind the driver's seat as shown in those pictures, can you state whether or not the pictures there represent generally the portion of the bus in which you were sitting, a bus similar to the one shown in the picture?

* * *

A. There is a similarity, yes.

Q. (By Mr. Evans): Now, is there any major difference in the bus in which you were riding from the interior of the bus shown in those pictures, other than the rails behind the driver?

(Testimony of Esther Westfall.)

A. This is a much newer bus.

Q. Except for the apparent newness, is there any material [56] difference so far as you can tell; I would like for you to look at them closely.

A. Well, as I remember, the seat of the bus wasn't quite as far back from the driver's seat. I think those old buses, the seats were up a little bit closer.

Q. The distance between the driver's seat and the front of the seat behind the driver was a little less on the bus you were in than the one shown in this picture?

A. Yes.

Q. That is your estimate of it now?

A. That is my estimate.

Q. But generally, not being specific as to distances, will you state whether or not now that gives a general picture of the interior of a bus that is similar to the one that you were in with the exception of the guard rails?

A. Yes, and this rail down here; there was no rail like that on the bus.

Q. The rail down there; can you give us some description of it so the reporter will understand what you mean?

A. The rail up and down.

Q. The horizontal bar?

A. The horizontal bar.

Q. The vertical bar?

A. There was no vertical or horizontal bar on the bus we [57] were on.

Mr. Evans: I offer Defendant's Exhibits A, B and C.

(Testimony of Esther Westfall.)

The Court: I will receive it as showing a similarity between the bus depicted in the pictures and the one in which she was riding at the time of the accident. It may be received.

(Defendant's Exhibit A received in evidence.)

(Defendant's Exhibit B received in evidence.)

(Defendant's Exhibit C received in evidence.) [58]

* * *

Redirect Examination

By Mr. Pennington: [59]

* * *

Q. Will you repeat or restate just what the situation on the bus, with reference to the side of the bus and the position of the driver and so on, was directly in front of you?

A. Well, the driver's seat was to the right of me and I was sitting next to the wall of the bus on the left-hand side. I was not sitting directly in back of him.

Q. Directly ahead of you what was there?

A. There was a vacant space there.

Q. Until what point—until the dash on the truck was reached?

A. The dashboard and the windshield.

Q. About how much space was there in there;

(Testimony of Esther Westfall.)

just give us an idea—from the left side of the bus to the seat occupied by the driver, about how much space was there?

A. Between the end of his seat and the wall of the bus?

Q. Yes; between the seat occupied by the driver and the left side of the bus.

A. Well, I judge it would be between a foot and a half or two feet.

Q. And directly ahead of you how much space was there? [60]

A. It is hard to estimate that, but I would say over two feet; a little over two feet. [61]

* * *

Recross-Examination

By Mr. Evans: [63]

* * *

Q. If you had been sitting in that portion of the seat next to the aisle you would have been sitting directly behind the driver? A. Yes, I would.

Q. But you were sitting over——

A. I was sitting next to the wall of the bus on the left-hand side.

* * *

Q. Now, there was a back on the driver's seat similar to the back of the seat that you were sitting on? A. Yes, there was.

Q. So far as you observed, it was a rather firm piece of furniture there on the bus that would have

(Testimony of Laura Troxell.)

The Witness: My seat.

The Court: That is what happened at this very time when Mrs. Westfall was thrown?

The Witness: Yes. We carried our costumes in suitcases; yes. [70]

* * *

Cross-Examination

By Mr. Evans:

Q. Mrs. Troxell, did you get paid anything for your services on these U S O trips?

A. No, I didn't.

Q. Did you gain any enjoyment or pleasure out of going on these trips? A. Yes, I did.

Q. Do you think the other entertainers did, too?

A. Well, I imagine they would or they wouldn't have done it because it was purely voluntary.

Q. It was purely voluntary on your part whether you went or whether you didn't? A. Yes.

Q. Why did you go?

A. Well, I think that anyone that enjoys performing in front of audience does enjoy that. And after all I mean it was part of the war effort. I did enjoy performing, so I went. [72]

* * *

MRS. W. C. BRUCK

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

* * *

Q. Mrs. Bruck, did you accompany the Westfall U S O Troupe on a trip from Seattle to Fort Lewis, Washington, on the evening of February 20, 1946?

A. Yes, I did.

* * *

Q. You accompanied this trip to Fort Lewis for the purpose of providing entertainment for the military personnel stationed there? A. Yes.

* * *

The Court: Get right down to the accident. Tell me what you know about it.

The Witness: Well, the bus driver drove quite fast and recklessly the whole way as if he were mad about something. He would jerk and start up quickly and go too fast all the way out. At this particular time he was approaching a red and green traffic signal. And instead of slowing up as one would normally do, he maintained his speed until he got right to the light and then slammed the brakes on, which threw us all forward in our seats. However, Mrs. Westfall, it threw her off of her seat onto the floor of the car.

The Court: You saw that, did you?

(Testimony of Mrs. W. C. Bruck.)

The Witness: No, I didn't see her fall. I saw her on the floor afterwards.

The Court: How far were you seated from her?

The Witness: I was about halfway back on the bus, I think, on the right-hand side.

The Court: You didn't see her fall but you did see her on the floor?

The Witness: On the floor, yes, sir. [79]

* * *

Cross-Examination

By Mr. Evans:

* * *

Q. Your purpose in being along was that of being chaperon?

A. I don't quite understand your reference to chaperon. We were naturally chaperons, being parents, and adult members of the troupe.

Q. You wouldn't allow your daughter to have gone alone on this trip unless there were some chaperon along, would you? A. No. [81]

* * *

Q. As I understand, an invitation was extended by somebody from the Army down at Fort Lewis for some entertainers to come down on this particular night?

A. That is what I understood.

Q. And your group responded to that invitation?

A. That is right. [82]

* * *

MRS. E. T. HOLLOWAY

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

Q. Will you state your full name and address, please?

A. Mrs. E. T. Holloway; 2729 California Avenue.

Q. Mrs. Holloway, you have heard the testimony of the witnesses preceding you as to this trip of this U S O troupe from Seattle to Tacoma; will you explain in your own words to the Court what occurred that evening?

The Court: You were along on the trip, were you? [83]

The Witness: Yes, I was. As far as I remember, I was sitting about halfway back on the left-hand side. I do remember he was driving very fast. And this sudden stop at the stop light, we all were jolted forward and Mrs. Westfall was jolted out of her seat.

The Court: You saw that?

The Witness: No, I didn't; I saw her on the floor.

Q. (By Mr. Pennington): Do you recall where Mrs. Westfall was seated? A. Yes, I do.

Q. Where was she sitting?

A. On the first seat behind the driver.

(Testimony of Mrs. E. T. Holloway.)

Q. That is on the left side of the bus facing the front end of the bus? A. That is right.

Q. Where was she on the floor?

A. I don't recall that. [84]

* * *

Q. Have you been closely associated with Mrs. Westfall subsequent to this accident?

A. Well, some, yes.

Q. Have you had occasion to see her at different times, I mean? A. Yes, that is true.

Q. Do you happen to know whether or not she has evidenced any continuous suffering or has this ankle or back injury continued to bother her since this accident? A. Yes, I do know that. [85]

* * *

Q. Have you ever had occasion to see her ankle when it was in a swollen condition?

A. Yes, I did.

Q. On more than one occasion?

A. Yes.

* * *

Cross-Examination

By Mr. Evans: [86]

* * *

Q. You were the third adult that was on the——

A. That is right.

Q. There were only three adults on the trip?

A. That is right.

Q. You had no part in the entertainment?

A. No.

(Testimony of Mrs. E. T. Holloway.)

Q. You were just along for the ride as part of the——

A. I had a daughter with the group.

Q. As far as you were concerned, it was just sort of a pleasure trip?

A. That is right. [87]

* * *

BARBARA JEAN WESTFALL

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

* * *

Q. Are you a daughter of Esther Westfall, the plaintiff in this case? A. Yes, I am.

Q. You have heard from the testimony given here, Miss Westfall, of the accident in which your mother was involved while en route to Fort Lewis on February 20, 1946? A. Yes.

Q. Were you a member of that troupe and did you accompany them on that evening?

A. Yes, I did. [96]

* * *

Q. Did you see your mother thrown from the seat at the time the stop in question was made here?

A. Yes. First she was there and then she wasn't.

Q. What was the cause of her being thrown from the seat; will you explain in your own words just what happened?

(Testimony of Barbara Jean Westfall.)

A. Well, the driver was driving awfully fast and there was a red light and he just stopped suddenly and it just threw her on the floor.

Q. I didn't get the last. He stopped suddenly and your mother was thrown to the floor?

A. Yes, thrown on the floor. [97]

* * *

Q. Miss Westfall, in approaching this intersection at which the accident occurred, how was the driver of this bus driving?

A. He was driving very fast.

Q. Could you estimate the speed?

A. Well, I would say about between fifty and sixty miles an hour. [98]

* * *

Q. In approaching the light, will you attempt to tell us just how he made the stop?

A. Well, I don't know exactly. I don't know if he had seen the light or what but he just all of a sudden threw on his brakes abrupt.

Q. Did you happen to notice whether there was any other traffic, especially cross traffic?

A. I didn't see any other traffic.

* * *

Q. Have you continued to reside at home with your mother during the years since this accident?

A. Yes, I have.

Q. Did she make any complaints or was there any evidence of injury to her ankle or back subsequent to the accident?

A. Yes. Yes, there has been. It has been very

(Testimony of Barbara Jean Westfall.)

painful. [99] Her leg is always swelling. Her left leg swells.

Q. Will you speak just a little bit louder, please?

A. Her left leg is always swelling. When she has been walking or standing on it, it swells, and her back bothers her a lot.

Q. During this period have you had occasion to assist her or help her in any way or treat her?

A. Well, yes; I helped rub her leg, rub her back, and wrapped a bandage on her leg when she used to wear that rubber bandage on her leg.

Q. Is it a fairly continuous thing?

A. Sometimes it bothers her worse than other times when she has to walk a lot or stand a lot.

Q. Has this condition continued down to the present time? A. Yes, it has.

Q. She still continues to complain of her ankle and her back? A. Yes.

Q. Has she managed to do her usual household chores and work during this period?

A. No. Eunice and I do all of the household work and cook.

Q. Have you since the accident? A. Yes.

Q. Has that been made necessary because of this accident? [100] A. Yes.

Q. Do you know whether her injuries since this accident have interfered with her work in any way or not?

A. I know some days she can't go out to work because she just doesn't feel well and then she stays at home.

(Testimony of Barbara Jean Westfall.)

Q. Can you recall any specific instances when you have assisted in treating your mother such as massaging or using ice packs or anything of that nature? [101]

* * *

A. H. SEERING

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

* * *

Q. Are you a practicing physician, Doctor?

A. Yes, I am.

Q. Where do you maintain your offices?

A. I am associated with a large clinic in the Securities Building in this city.

Q. How long have you been practicing medicine?

A. I graduated from the University of Minnesota Medical School in 1932, following which I interned in Providence Hospital in this city, and following which I served a surgical and orthopedic residency in the County Hospital in this city. For several years I was associated with a large industrial hospital in Eastern Washington. And for the last twelve and a half years I have been associated with a clinic where I now am, doing orthopedic and traumatic surgery.

(Testimony of A. H. Seering.)

Q. You have specialized during the last twelve years?

A. I have done that work exclusively for the last fifteen [106] years.

Q. Did you attend the plaintiff, Mrs. Esther Westfall, in this accident? A. Yes.

* * *

Q. Will you tell the Court when you first examined Mrs. Westfall and what you found upon that examination?

A. She was first seen by me on the 21st of February, 1946, with the complaint of an injury having been sustained on, I think, the previous evening as a result of an accident sustained while riding as a passenger in an Army bus, I believe she stated.

The complaint at the time was an injury of the left ankle and a painful spine. I examined her on that date and found that there was a massive and extreme swelling of the left ankle, and marked discoloration of the ankle. There was considerable pain and tenderness in the region of the lower dorsal spine, particularly the 12th dorsal vertebra, and there was marked limitation of motion of the entire spine because of pain and spasm. X-ray examination done on that date and the several dates following this first [107] visit did not reveal any fracture or any bone injury in the ankle or the spine. She did, however, receive a number of physiotherapy treatments to the ankle and the spine over a period

(Testimony of A. H. Seering.)

consuming approximately a year and a half from the date of my first examination.

* * *

Q. At the time you last examined her, which was in the spring of 1947, Doctor, was there any residual disability remaining from these injuries?

A. Yes; there was still marked point tenderness or very definite point tenderness over the spinus process or the bony prominence over the 12th dorsal or 13th dorsal vertebra. There was a fluctuant mass in the under-surface of the left ankle. There was in my opinion, at that time or immediately before I last saw her, it was my opinion that it was very possibly a joint hernia present there as the result of torn [108] ligaments, and a herniation of the joint tissues between the skin. [110]

* * *

Q. I believe you stated your final diagnosis in this case was severe sprain?

A. Yes. We were unable to establish any bone injury in either the spine or the ankle joint and actually that is all that an x-ray of an extremity will show us with any certainty.

The only remaining injury that we could make any conclusion on was a severe soft tissue injury.

Q. From the nature of the sprain as you found it to exist, can you state with any reasonable degree of certainty whether there is likely to be a continuing disability?

A. The time I saw her last, it was approximately

(Testimony of A. H. Seering.)

16 months from the date of her injury, and she was at that time [111] extremely disabled. It is very difficult to state these things in percentages—by a percentage evaluation, because that entails taking into consideration the patient's employment, whether it is sedentary, whether it necessitates a lot of ambulation. She was extremely disabled for any work that would require a lot of walking and a lot of physical activity. If her work were sedentary, then perhaps she would be disabled to a lesser degree. But in anything that involved motion in her daily livelihood she was at a constant handicap because of it.

Q. Were these injuries such that they ordinarily were accompanied by pain; I believe you stated they were, did you not?

A. That is right. And up to the last time I saw her, she was still receiving treatment at intervals—at frequent intervals—and had still almost as great, well, certainly not as great as when I saw her the day after the injury but she had a severe degree of limitation of motion to the spine and severe swelling of the ankle and considerable pain in walking. I haven't seen her since that date and am unable to draw any conclusions as to her present condition.

Q. Do you recall the plaintiff's age at the time you [112] examined her or last examined her, either?

A. Her age at the time of her injury was 41 years, as it appears in my notes.

Q. I don't think any mention has been made of

(Testimony of A. H. Seering.)

life expectancy but perchance could you state what her life expectancy would be for that age?

A. For a woman, according to insurance actuarial figures, it would be approximately 26 years.

Q. Doctor, did you render a bill for your services in this case?

A. There is a bill here, yes. It is itemized. This is a copy of a bill that was undoubtedly rendered.

Q. Would you just state the total amount, Doctor?

A. The total amount is \$114.25. That is itemized for the services rendered between the dates of February 21, 1946 and June 11, 1947. Would you like this?

Q. I don't believe we need that in evidence; but I would like to ask you, Doctor: This covers the series of treatments which you administered?

A. Yes; that is all itemized.

Q. Mrs. Westfall stated in her testimony, Doctor, that she held a policy with the Medical Security Clinic. Is that the clinic with which you are connected?

A. It was then so named; it is now incorporated as the Group Health Cooperative of Puget Sound.

Q. And the consideration which went to pay for the services received by her at your clinic, would it have been covered under the terms of that policy?

A. That is correct, although there is a subrogation clause which entitles us to seek recourse against any other liable party if such there be, under the terms of the contract. [114]

(Testimony of A. H. Seering.)

Cross-Examination

By Mr. Evans:

Q. Doctor, do I understand that your bill of \$114.25 was paid by the insurance company?

A. No; there really isn't any insurance company involved in it.

Q. As I understand, there was some sort of a policy where you had a right of subrogation here?

A. It is a contract, yes, between patients,—we have a contractual agreement with the patients to render medical services. In the event of the liability of any third party we have a clause, whether legal or not, which entitles us to take recourse against that third party.

Q. So actually what Mrs. Westfall was out was \$3 a month, is that right?

A. That is probably true, yes.

Q. She didn't actually pay the \$114.25?

A. I really don't know.

Q. Well, you don't know whether you have been paid or not?

A. No, I don't. That would be handled by the accounting office, anyway.

Q. Well, she was a patient up there under this medical policy, was she not?

A. That is right. [115]

Q. And under the normal course of events the \$3.00 a month pays for her medical services?

A. That is right.

(Testimony of A. H. Seering.)

Q. And the \$114.25 would have not have been paid by her? A. Probably not.

Q. If she had considered she needed further treatment, could she have still gone to your office and obtained such treatment as you might prescribe for this \$3.00 a month?

A. Well, I really don't know. I don't have a copy of the contract which covered her and provided her with medical services. There were then, I am sure, and I know there are today, limitations placed on the duration of services available.

Q. Do you know whether or not she had used her rights under this policy to the fullest extent so far as your services were concerned?

A. She had in all probability exceeded it by that time, I believe. It is quite generally too true, now, with the very few contracts that we have for medical services. It is true that the time limit for the treatment of any condition is six months, by which token she would have exceeded it by eight months.

* * *

Q. By any chance do you have a letter which you wrote to the law firm of Griffin & Griffin on June 21, 1948? A. I have a copy of that, yes.

Q. May I see it, please?

A. The June 21, 1948?

Q. Yes.

A. (Witness hands sheet of paper to Mr. Evans.)

Mr. Evans: I would like to have this marked for identification, please.

(Testimony of A. H. Seering.)

(Carbon copy of letter from Dr. Seering to Griffin & Griffin, marked as Defendant's Exhibit D for identification.)

Q. (By Mr. Evans): This Exhibit D which you have just given me is a true copy of the letter which you transmitted to opposing counsel?

A. I presume it is. It is not certified but I presume that can be verified.

Mr. Pennington: I have the original here.

Mr. Evans: May I have this one marked [117] for identification?

The Court: Substitute it for the other.

The Clerk: This is the same letter?

Mr. Evans: Yes. Substitute it for the other.

(Original copy of letter from Dr. Seering to Griffin & Griffin marked as Defendant's Exhibit D for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit D, Doctor, can you identify that letter as being one which you wrote?

A. That is right. That bears my signature.

Mr. Evans: I will offer Exhibit D.

Mr. Pennington: No objection.

(Defendant's Exhibit D received in evidence.)

(Testimony of A. H. Seering.)

DEFENDANT'S EXHIBIT D

Medical Security Clinic
Securities Building—Third and Stewart
Seattle 1, Washington
ELiot 6988

June 21, 1948

Griffin & Griffin,
Palomar Building,
Third & University,
Seattle 1, Washington.

Re: Esther Westfall.

Dear Sirs:

The above named client of yours was seen by me on February 21, 1946, relative to an ankle (left) and back injury sustained on February 20, 1946. She first complained of the ankle and X-ray examination was done and found negative for bone injury.

A few days later she returned complaining of her back. Examination revealed tenderness over the left 12th rib. X-ray was negative for bone injury.

She received numerous physical therapy treatments to her ankle and back from that time until August 8, 1946. When last seen on June 11, 1947, she still complained of persistent backache. Final diagnosis was severe sprain and contusion of lumbar spine and lower dorsal spine. Severe sprain left ankle.

(Testimony of A. H. Seering.)

There was appreciable residual disability remaining when she was last seen.

Very truly yours,

MEDICAL SECURITY CLINIC,

/s/ A. H. SEERING, M.D.

AHS/pm

Encl.

Admitted January 9, 1951.

Mr. Evans: According to this letter it states here, "The above-named client" referring to Esther Westfall—"was seen by me on February 21, 1946, relative to an ankle and back injury sustained on February 20, 1946. She first complained of the ankle. An X-ray examination was done and found negative for bone injury."

Then in the next paragraph you state: "A few days later she returned complaining of her back."

Do I take it to understand from that that [118] on her first visit she made no particular complaint about her back?

A. Well, the ankle was obviously the most acutely painful at the time she was seen on the first date, the 21st of February.

The Court: The question is did she complain about her back the first time you saw her?

The Witness: Apparently not, or at least it wasn't called to my attention.

(Testimony of A. H. Seering.)

Q. (By Mr. Evans): A few days later when she returned, however, she was complaining about her back? A. That is right.

* * *

Q. Isn't it a fact that individuals and particularly women who weigh in excess of 250 pounds frequently [119] have trouble with their ankles for no particular cause at all, merely because of excessive weight? A. Oh, it occurs, yes.

Q. And because of having to carry that excessive weight isn't it likewise true that they frequently have trouble with their back?

A. That is occasionally true. [120]

* * *

The Court: Doctor, in your treatment were there any objective findings relating to the back injury?

The Witness: The last complaint she had was the pain in the back, and she still had the point tenderness as we call it over the spinous process of the 12th dorsal vertebra, and that was in June, 1947. I am unable to say anything about her symptoms.

* * *

The Court: You did find muscle spasm, did you?

The Witness: That was apparent throughout her convalescence and was one of her most persistent complaints.

The Court: And that validated her complaints?

The Witness: It would. Of course, we have got to decide between a patient who has pure subjec-

(Testimony of A. H. Seering.)

tive complaint, on the basis of a purely organic condition. The complaint of pain, also, is a subjective complaint. When it is so consistently the same and in the same place, it is rather difficult for a patient to see her own back. And when it is consistently located at the same point of tenderness it is not very likely that the symptom is being simulated.

The Court: She couldn't simulate the muscle spasm there, could she?

The Witness: Not very likely. Nor could [123] she constantly simulate a point of tenderness by simply contact on pressure. And it was always persistently over the 12th dorsal vertebra.

The Court: Anything further from the doctor?

Q. (By Mr. Pennington): And your final diagnosis with reference to her back was severe sprain?

A. Severe sprain, and likewise of the ankle except for the question of a possibility of a joint hernia.

* * *

WALLACE W. LINDAHL

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

Q. Will you state your name, please?

A. Wallace W. Lindahl.

(Testimony of Wallace W. Lindahl.)

Q. You are a practicing physician?

A. I am. [124]

Q. Where do you maintain your office, Doctor?

A. 702 Summit Avenue.

Q. How long have you been practicing medicine, Doctor?

A. I have been practicing in Seattle since the 1st of July, 1946.

Q. Of what medical college are you a graduate?

A. Northwestern University.

Q. Doctor, have you specialized in any particular branch of medicine or surgery?

A. I am a specialist in the field of internal medicine.

Q. Have you examined Mrs. Esther Westfall who is the plaintiff in this action, Doctor?

A. I have, yes.

Q. When did you examine Mrs. Westfall?

A. March 8, 1949.

* * *

Q. I think the findings of your examination.

A. I see. I found that the positive physical findings were the extreme weight, 253 pounds, and a pitting edema of both lower extremities, and a swelling of the left ankle which was greater than a swelling of the [125] right ankle. Both legs were somewhat swollen throughout. There was point tenderness just anterior to the exterior malleolus of the left ankle on pressure. I believe those were the essential positive findings.

(Testimony of Wallace W. Lindahl.)

Q. Did you make any findings with reference to Mrs. Westfall's back?

A. I noted at the time that I saw her that her back appeared to be normal.

Q. There was no tenderness to palpation during your examination of her?

A. I did not find any, no.

Q. And the left ankle?

A. It did have point tenderness just anterior to the external malleolus and it was swollen. It measured as I recall, in circumference 12 inches. The ankle on the right side was measured and measured 11 1/2 inches. [126]

* * *

The Court: Did she complain of any tenderness [127] in her right ankle?

The Witness: No, she didn't.

The Court: But you found a condition in the right ankle somewhat similar to the one in the left?

The Witness: No. The only condition found in the left ankle was that it was more swollen than the right.

The Court: Well, you found the swelling in both ankles, didn't you?

The Witness: Yes, there was some swelling in the legs and both sides all of the way up.

The Court: Have you any opinion now as to the cause of the condition you found in those ankles?

The Witness: It is my feeling that a portion of the swelling in both legs was due to the fact that

(Testimony of Wallace W. Lindahl.)

this woman weighed 253 pounds and that a pitting edema, that is, a pitting swelling of the legs on both sides but it was greater on the left than on the right; and it was my assumption that the left being greater than the right, and there being point tenderness there, that there was not on the right side,—that is, point tenderness on the left side that there was not on the right side, it was my assumption that that was due to the injury that was incurred.

* * *

The Court: I just wonder if you could give me some idea of how much pain and discomfort, if any she would have had had she not had the injury.

The Witness: I don't believe that we can feel she would have had any pain and discomfort in the left ankle had she not had the injury. [129]

* * *

The Court: Is it your opinion that the pain she complained of was caused through the injury?

The Witness: It is my impression or it was my impression at the time that I examined her that the pain and the greater swelling on the left side was the result, first of all, of the injury; and secondly, an aggravation of that by having to carry excessive weight, yes.

Q. (By Mr. Pennington): Did you render a bill for your services? A. Yes, I did.

Q. Can you state the amount at this late date?

A. The amount was \$15.

Q. Were there any x-rays made?

(Testimony of Wallace W. Lindahl.)

A. Yes, there were, but that did not include the cost of the x-rays. The x-rays were made by a specialist in radiology. [130]

* * *

Cross-Examination

By Mr. Evans:

* * *

Q. It is my understanding you examined her on March 8, 1949?

A. My records indicate I believe that I did examine her on [131] that date.

Q. At whose request did you make that examination?

A. She was referred to me by Mr. Griffin.

Q. Did you render a report to Mr. Griffin?

A. I believe I did, yes.

Q. Did you prescribe any treatment for her at this time?

A. Yes, I did.

* * *

Q. In other words, your examination at this time was for the purpose of being able to testify here in this lawsuit, is that right?

A. I presume it is.

Mr. Evans: I move that all of this doctor's testimony with regard to costs be stricken. I don't believe that is a part of the recoverable costs.

The Court: The motion is denied. [132]

* * *

E. E. SPRECHER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

Q. Are you a practicing physician, Dr. Sprecher?

A. I am.

Q. Where do you maintain your office?

A. In the Medical Dental Building.

Q. How long have you been practicing medicine, Doctor?

A. Ten years.

Q. Of what medical college are you a graduate?

A. The College of Medical Evangelists.

Q. Have you specialized in any particular form of medicine or surgery, Doctor?

A. I specialized in orthopedics.

Q. How long have you practiced this specialty?

A. Two years.

Q. Are you connected with any institutions here in Seattle at present, Doctor?

A. Yes, I am.

Q. In what capacity?

A. I am a clinical instructor in orthopedics at the [133] University of Washington. I am on the teaching staff at the Orthopedic Hospital.

Q. Have you examined Mrs. Westfall, the plaintiff in this action?

A. I have.

(Testimony of E. E. Sprecher.)

Q. When did you examine Mrs. Westfall, Doctor?
A. The 11th of December, 1950.

Q. Would you state to the Court what your findings were upon that examination?

A. I found her to be complaining of pain in her back and in her left ankle. Examination of her back revealed a very minimal amount of muscle spasm, a minimal amount of limitation in motion, and considerable tenderness to palpation in the upper lumbar and lower dorsal muscles, particularly about the 12th thoracic. She also had pain on palpation about the left ankle, particularly on the outer side. At the time that I [134] saw her, she had no swelling in either ankle. She gave a history of limited use of her ankle, weakness. She said that it gave out easily; that she was able to stand on her foot a limited amount of time and do a limited amount of walking; excessive activity caused considerable pain in her ankle.

Q. From the history of this patient and from the symptoms if any, as found by you or as just outlined by you, Doctor, what is your diagnosis?

A. I think that she had a sprain of her back and a sprain of her left ankle.

Q. Are these injuries of such a nature that they ordinarily are accompanied by pain and suffering from pain?

A. It was my opinion that her injuries were considerably more severe than the average sprains are. The disability following the injuries was much more marked than usual and much more prolonged. It was my opinion that both the injury in her back

(Testimony of E. E. Sprecher.)

and the injury in her ankle, at the time that she was injured, were severe.

Q. From that, Doctor, could you state with any reasonable certainty whether the physical injuries found in this plaintiff were such as might be of a permanent nature or have a permanent effect; and if so, what would that effect be? [135]

A. It was my opinion that the condition, when I examined her, was a permanent one. It would affect her in limiting her working capacity, limiting the time that she could stand, and limiting the amount of walking she could do, and limiting any other work that she could do.

Q. Unless her activities were kept within these restricted limits, what would be the result?

A. She probably would have pain in her ankle and her back to the point that she wouldn't be able to do anything.

* * *

The Court: Does surgery offer any prospect?

The Witness: Yes, I think it is probable that she could be improved by surgery. It was my opinion, though, that if she limited her activities she probably would get along about as well without it. There is some question in my mind how much she would be improved by surgery either on her back or on her ankle.

The Court: Your advice, then, to her is not to have surgery but just to limit her activity?

The Witness: That was my advice.

The Court: And it still is?

(Testimony of E. E. Sprecher.)

The Witness: It still is. [136]

Q. (By Mr. Pennington): Did you render a bill for services in examining this plaintiff and if so in what amount?

A. It may sound funny but I don't know.

Q. What would it be?

A. My usual fee for such services is \$15.

Q. And you consider that such fee is reasonable?

A. Yes.

Cross-Examination

By Mr. Evans:

Q. Doctor, at whose request did you make this examination?

A. I made this examination at the request of her attorney.

Q. Did you render a report to her attorney?

A. Yes, I did.

Q. And you made this examination for the purpose of being able to testify here in this trial as to your findings?

A. Not necessarily. Her attorney consulted me on the telephone and asked me to examine her and asked me to recommend treatment for her if there was some treatment that I thought would benefit her.

Q. Has any treatment been recommended by you?

A. The only recommendation I made was that she limit her activity.

Q. What do you mean by limiting activity? [137]

(Testimony of E. E. Sprecher.)

A. Avoid motion of her back as much as possible; to do a minimal amount of stooping and bending and twisting,—all activities which would cause motion in her back; to do a minimal amount of walking or a minimal amount of standing. It was my feeling that excessive activity along these lines would disable her to the point where she would not be able to be up and about at all.

Q. Did you measure her ankles?

A. No, sir.

Q. You didn't take any measurement of them at all?

A. No, sir.

* * *

Mr. Pennington: That concludes the Plaintiff's case, your Honor.

(Plaintiff rests.)

Mr. Evans: I would like to move to challenge the sufficiency of the evidence, your Honor.

The Court: I think it is sufficient. [138]

* * *

HAROLD R. BARTON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

* * *

(Testimony of Harold R. Barton.)

Q. Where are you employed, Mr. Barton?

A. The Vashon Schools at Vashon Island. [141]

* * *

Q. How long have you been employed in your present capacity?

A. This is my third year as superintendent.

Q. Will you state whether the plaintiff here, Esther Westfall, has ever worked in any of the schools under your supervision?

A. Yes, she did. She started on November 1, 1948, and taught through the balance of the year.

Q. On any occasion during that period of time, did you have occasion to see her and observe her?

A. Yes, I did.

Q. Did it ever come to your attention or did you ever observe anything that would indicate to you that she had any physical disability?

A. I saw nothing to that effect, no, sir.

Q. Had she had a limp of any degree at all, do you think you might or might not have noticed it?

A. I think I would have.

Q. Had she had any other type of physical disability, will you state whether or not you think you would have noticed it? [142]

A. I believe I would have.

Q. About how frequently would you see the plaintiff during this period from November, '48 to June of '49?

A. I attempt to get into each one of the schools approximately once a week.

(Testimony of Harold R. Barton.)

Q. Did you see her on each one of those occasions?

A. I expect on most of the occasions, anyhow.

Q. Will you state whether or not you recall submitting a report to the Seattle School District on Esther Westfall's qualifications sometime in 1949?

Mr. Pennington: If your Honor please, I object to this type of evidence being brought out. I can't see where it has any bearing.

The Court: Sustained.

Mr. Evans: My question is preliminary, your Honor. I believe it would be competent for him to testify what he put in that report in regard to her physical ability and that was my purpose.

The Court: Objection sustained.

Mr. Evans: You may cross-examine.

Cross-Examination

By Mr. Pennington: [143]

* * *

Q. And you stated that you usually got to the different schools on Vashon Island on an average of about once a week? A. That is right.

* * *

Q. In the ordinary course of events would there ordinarily have been any reason for you to have had occasion to notice Mrs. Westfall's ankles to notice whether they were swollen or anything of that sort?

A. I wasn't in the habit of doing that but I

(Testimony of Harold R. Barton.)

would have noticed something on the playfield or in the classroom.

Q. You made the statements you would have been in a position to have observed any disability had she had one? A. I believe so. [144]

* * *

KATHERINE DEASY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

* * *

Q. Where are you employed, Miss Deasy?

A. At Latona School as principal.

Q. How long have you been so employed?

A. Seven years.

Q. Do you recall whether or not Esther Westfall has ever worked at your school? [145]

A. Yes; from January 28th to March 1st.

Q. What year? A. 1946.

Q. How many teachers were employed at the school during that period?

A. Fourteen at the time.

Q. Will you state whether or not you had an opportunity to daily observe the teachers in your school? A. Every day.

Q. Will you state whether or not at any time during that period of time you observed any limp

(Testimony of Katherine Deasy.)

or other outward manifestation of any injury in Mrs. Westfall?

A. That is a very vague memory in my mind. I would not like to swear to that.

Q. Do you recall any such?

A. I don't recall, myself.

Q. If she had been injured and had any limp, will you state whether or not you now believe that would have come to your attention?

A. I think so.

Q. And you believe that you would now remember it, if it had occurred? A. I think so.

Q. Do you have any recollection of any such?

A. From my own viewpoint, no. [146]

* * *

Cross-Examination

By Mr. Pennington:

Q. Miss Deasy, I believe you stated that you have no conscious recollection of having seen her limp during this period of employment?

A. Yes, sir.

Q. Do you mean to say by that that if she had had an injured ankle that you think you would recall it? A. I think I would.

Q. Do you think if she had limped or otherwise?

A. Will you state your question again, please?

Q. You stated that you have no conscious recollection of seeing Mrs. Westfall limp?

A. Yes, sir.

* * *

Q. I see. But you can't state positively she

(Testimony of Katherine Deasy.)

didn't have [147] a swollen or an injured ankle?

A. No, I can't state positively. [148]

* * *

Mr. Evans: I would like to call Mrs. Esther Westfall as an adverse witness.

The Court: You may do so.

ESTHER WESTFALL

recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Evans:

(Document, Teacher's Application, marked as Defendant's Exhibit E for identification.)

Q. Mrs. Westfall, handing you what has been marked for identification as Defendant's Exhibit E, which purports to be a document where there is some handwriting on it, will you please examine it and tell me whether or not that is in your handwriting? A. Yes, it is.

Q. And will you look at the reverse side of it; is that [149] in your handwriting?

A. Yes, it is.

Q. Isn't that your application for a job as a permanent instructor with the Seattle Public Schools? A. Yes, it is.

Q. And the information furnished thereon is the information which you furnished in connection with that application? A. Yes.

(Testimony of Esther Westfall.)

Q. And you submitted that application sometime in June of '49? A. Yes.

Mr. Evans: I would like to offer Exhibit E.

Mr. Pennington: No objection.

The Court: It will be received.

(Defendant's Exhibit E received in evidence.)

Mr. Evans: In that connection I have a photostatic copy of that application which I would like to substitute for Exhibit E, the reason being that the Seattle Public Schools would like to have the record for their files.

The Court: I am sure counsel would have no objection if it is a photostatic copy.

Mr. Pennington: No objection. [150]

The Court: Yes, that may be substituted for the original. [151]

* * *

FLORENCE WAYMAN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

* * *

Q. Where are you employed, Mrs. Wayman?

A. Seattle School District.

Q. How long have you been employed there?

A. Sixteen years.

(Testimony of Florence Wayman.)

Q. In what capacity?

A. Pay roll clerk.

Q. Will you state whether or not in that capacity you are the custodian of the pay roll records?

A. Yes, I am.

Q. Will you state whether or not those records would reveal the number of days and the dates that Mrs. Westfall worked for the Seattle schools?

A. They would.

Q. Do you have those records with you?

A. I do.

Q. Are they all in this box yet? [152]

A. Yes, they are.

Q. Will you state whether or not you have prepared a summary of the days that Mrs. Westfall has worked for the Seattle Public Schools during 1945 and 1946?

A. I had it prepared.

Mr. Evans: Will you mark this for identification, please?

(Document, Teacher's Record of Employment, marked as Defendant's Exhibit F for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit F, will you state whether or not that is a summary of the salary and the days that Mrs. Westfall worked that you have prepared?

A. Yes, it is.

Q. Will you state whether or not all of the information which is on Exhibit F is contained in the

(Testimony of Florence Wayman.)

books and records of the Seattle School District No. 1? A. Yes, that is right.

Q. I notice on the left-hand side of that document there are some pencilled notations. Will you state who made those? A. I made those.

Q. Of what if any significance are those pencilled notations? [153]

A. At that time—'46 and '45—our salary for substitute teachers was \$7.50 a day for a casual substitute. Anyone teaching a school month or 20 days received \$8.50 a day. At that time, Mrs. Westfall, I believe, taught over the twenty days at Latona in one assignment.

Q. Is that the notation that is on the left-hand side? A. That is what it means, yes.

Q. These books and records which you have brought here and are in this box, will you state whether or not they are the books and records kept in the regular and usual course of business by the School District for the purpose of keeping track of pay rolls? A. They are.

Q. Will you state whether or not you are the custodian of these records? A. Yes, I am.

Mr. Evans: I will offer Exhibit F.

Mr. Pennington: No objection.

The Court: It will be received.

(Defendant's Exhibit F received in evidence.)

(Testimony of Florence Wayman.)

DEFENDANT'S EXHIBIT F

Seattle Public Schools
Administrative and Service Center
815-4th Avenue North
Seattle 9, Washington

January 3, 1951

Substitute Teaching of Esther Westfall, 1945-46

Month	No. of Days	School	Salary
Oct., 1945			
29, 30, 31.....	3	Madison	\$22.50
Nov., 1945			
1, 2, 7, 8, 9, 12.....	6	Madison	45.00
5	1	Franklin	7.50
Dec., 1945			
3, 4, 10, 11, 12, 13, 14, 18, 19, 20, 21.....	11	Madison	82.50
6, 7	2	High Point	15.00
17	1	West Seattle	7.50
Jan., 1946			
7	1	Madison	7.50
8, 9	2	West Seattle	15.00
10, 11, 14, 15, 17.....	5	Pacific	37.50
21, 22	2	Duwam' h B'd	15.00
28, 29, 30, 31.....	4	Latona	34.00
Feb., 1946			
1, 4-8, 11-15, 18-21, 25-28.....	19	Latona	161.50
Mar., 1946			
1	1	Latona	8.50
6-8, 11-15, 18	9	Beacon Hill	67.50
20	1	Hughes	7.50
21	1	Cooper	7.50
25	1	Lafayette	7.50
26	1	West Seattle	7.50
Apr., 1946			
3	1	Madison	7.50
5	1	Cleveland	7.50
18	1	Highland Park	7.50
23, 24 (1/2 day).....	1 1/2	Cooper	11.50
30	1	Duwamish B'd	7.50
May, 1946			
1, 2, 6-10, 13.....	8	Madison	60.00
14, 15, 16.....	3	West Seattle	22.50
17	1	Lafayette	7.50
20-24, 27, 28, 29, 31.....	9	Highland P'k	67.50

(Testimony of Florence Wayman.)

Month	No. of Days	School	Salary
June, 1946			
3, 4	2	Beacon Hill	15.00
5	1	Madison	7.50
6, 7	2	Cooper	15.00
11	1	Jefferson	7.50
Total days.....		103½	Total salary \$800.50

Admitted January 10, 1951.

Mr. Evans: No further questions. [154]

THOMAS JOSEPH YINGLING

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

* * *

Q. Where do you live, Mr. Yingling?

A. 2600 Llewelyn Avenue, Baltimore, Maryland.

Q. Will you state whether or not you have been subpoenaed to come here and testify in this trial?

A. I have.

Q. Will you state whether or not you were the driver of the bus that was involved in this instance about which this action is concerned?

A. I am.

* * *

Q. (By Mr. Evans): Are you still in the Army?
A. No, sir.

(Testimony of Thomas Joseph Yingling.)

Q. When were you discharged? [156]

A. May 26, 1947.

Q. 1946 or 1947? A. 1946.

* * *

Q. What was your particular assignment on February 20, 1946? [157]

A. Well, I was to drive a U S Army bus to Seattle at Second and Spring Street and pick up a U S O show and return to Fort Lewis to Service Club No. 1.

Q. That was the specific assignment; but I mean what was generally your assignment in the Army?

A. I was assigned with the motor pool at Madigan General Hospital.

Q. In what capacity? A. As a chauffeur.

Q. How long had you been so assigned to that organization?

A. Well, since I returned from the East Coast to the West Coast. The outfit hit Fort Lewis in August of '45.

Q. And you had been with Madigan General Hospital as a driver since August of '45?

A. Yes, sir.

Q. What kind of a bus was it that you were driving on this particular trip?

A. It was an International K-7.

Q. Do you recall whether or not there was more than one of such buses at the motor pool?

A. Yes, sir.

Q. Do you recall about how many such buses there were?

(Testimony of Thomas Joseph Yingling.)

A. Well, I believe we had close to nine.

Q. Will you state whether or not any of those buses were new buses? [158] A. Yes, sir.

Q. Do you recall approximately how many were new buses?

A. Well, almost all, I should say.

Q. The particular bus that you drove, can you give us any idea how old or how many miles that bus had on it at the time it started out?

A. The particular bus I drove was a brand new bus. It had anywhere from 12 to 15 miles on it when I left Fort Lewis.

Q. Prior to leaving Fort Lewis, will you state whether or not you made any type of an inspection of the bus?

A. Well, sir, we had what we called a first echelon maintenance that we had to perform before starting of the motor and leaving Fort Lewis, which included checking the gas and oil, the lights, windshield wipers, tires, brakes, emergency brake and everything that required safe operation on the bus.

Q. Will you state whether or not in the course of that inspection you made any observation of a governor on the bus? A. Yes, sir, I did.

Q. Can you give the Court any idea or description of what a governor looks like or where it is located on the bus?

A. Well, a governor on a bus is located directly under the [159] carburetor. It is approximately about five inches long, maybe three-quarters of an

(Testimony of Thomas Joseph Yingling.)

inch thick and an inch and a half wide. It is of white metal which is outstanding to the color of the carburetor.

Q. Will you state whether or not there are any devices of any kind on a governor which would in any way indicate whether or not the governor had been tampered with? A. Yes, sir, there is.

Q. What type of devices are there?

A. There is two pieces of spring wire that are sealed with a lead seal.

Q. What is the purpose of the seal,—the lead seal that you speak of?

A. The purpose of the lead seal is to keep anybody from tampering with the governor. By another man operating that bus and making his first echelon check he will find if that governor has been tampered with and it is his duty to report it to the motor pool.

Q. Will you state whether or not you observed anything about this particular bus before you made this trip to Seattle with which we are concerned here?

A. From my examination of the vehicle, I found the governor seal intact—in place.

Q. Will you state whether or not your superior officers [160] or non-commissioned officers, at that time, had any practices which caused you to be particularly careful about your first echelon maintenance?

A. Yes, sir. We had a staff sergeant that would go around into the motor pool where the vehicles were parked and would leave the air out of tires,

(Testimony of Thomas Joseph Yingling.)

unhook the distributor and so forth—the rotary cap in the distributor and pull the spark plug wires out. It was just a way of keeping the vehicles in first-class shape so that the second echelon wouldn't be too great after a weekly inspection.

Q. What would be his purpose?

A. His purpose would be to keep the men on the ball to keep checking them, in that our personnel was very small and we had a great deal of vehicles.

Q. How did jimmying up these vehicles in any way affect the efficiency of the personnel?

A. Well, sir, by each and every man making his daily check every time a bus went out, it eliminated the possibility of greater damage being done to the vehicle.

Q. Do you recall the manner in which this bus operated, so far as its speed was concerned?

A. Yes, sir. [161]

* * *

Q. Will you state whether or not anything occurred on your trip from Seattle and back to Fort Lewis that would indicate whether or not the governor was or was not functioning?

A. The governor was functioning, sir.

Q. How could you tell?

A. Particularly on a long hill, where the bus would hit 35 and then you couldn't go no faster. You would have to wait until the speedometer dropped below 35 before the accelerator would allow gas to go into the carburetor.

(Testimony of Thomas Joseph Yingling.)

Q. What kind of brakes were on this particular bus?

A. There was a hydraulic brake with a hydraulic booster.

Q. Will you state whether or not anything came to your attention that would indicate to you whether the brakes were working satisfactorily or not?

A. Yes, sir. When I first left the motor pool I found the brakes to be rather grabby; the slightest touch would stop them. Being unaccustomed to the new bus [162] and the new brakes, it was a little trouble getting into Seattle with the stopping and starting of the bus. But on my return trip I had just about gotten it to the point where I could regulate that pressure on the brake.

Q. Will you state whether or not on this particular bus there were any signs or plates or pieces of paper or anything that gave any instructions as to the maximum speed of the bus?

A. Yes, sir. There was an inspection plate on the bus that the speed was 35 miles per hour.

Q. Where was this inspection plate?

A. Directly in front of the driver, sir.

Q. Can you give us any idea of the size of the letters or numbers on this inspection plate?

A. The inside finish of the bus was OD and the letters were stenciled on in white paint, I would imagine about an inch high, sir.

Q. Can you recall of your own memory now the fastest speed you ever attained on this entire trip?

(Testimony of Thomas Joseph Yingling.)

A. I would say no faster than 38 miles per hour, sir.

Q. How could you get up to 38 miles per hour with a governor on it that limits it to 35.

A. Going downhill, the weight of the bus would let the governor slip maybe three miles—the torque in the [163] driveshaft. The wheels would go faster than what the motor was running and allow slippage of some kind in the clutch. [164]

* * *

Q. Do you recall approximately how many passengers you had on the bus?

A. I would say possibly fifteen, sir.

* * *

Q. Handing you Exhibits A, B and C, will you look at those exhibits and each of them and state whether or not you can recognize the view depicted in those pictures? A. Yes, I do.

Q. Can you tell us what that view depicts? [165]

A. It shows the driver's seat and the seat directly behind the driver; and also a hand rail behind the driver, sir.

Q. Will you state whether or not that view is similar to the same type of view of the interior of the bus you were driving on this particular night?

A. Yes, sir.

Q. With particular regard to the vertical hand-rail and the horizontal rail that is shown in that picture, do you recall whether or not on this particular bus there were such rails present?

A. Yes, sir, there was.

(Testimony of Thomas Joseph Yingling.)

The Court: Do you see anything different in those pictures from the bus that you drove that night?

The Witness: No, sir; not a thing different.

Q. (By Mr. Evans): Do you recall any conversation between yourself and any one of your passengers on the trip from Seattle back to Fort Lewis?

A. No, sir; not outside of Mrs. Westfall asking me to turn the lights on, sir.

Q. Do you recall when or where that occasion occurred?

A. Well, the exact spot on the road, sir, I wouldn't remember. All I could do is make a guess at that, sir.

Q. Do you recall what the occasion was when she wanted lights on? [166]

A. I believe it was to sort some sheet music for an accordion.

Q. Do you recall where Mrs. Westfall was sitting on the bus? A. Directly behind me, sir.

Q. Will you state whether or not Mrs. Westfall or anybody else on the bus made any remarks to you in regard to your driving? A. No, sir.

Q. If anyone had made any remarks to you in regard to your driving, will you state whether or not now you would remember that?

A. No, sir.

Q. As I understand, you would not remember it if they had?

A. If they had made any remarks, sir, I would have remembered it.

Q. Will you state whether or not you recall

(Testimony of Thomas Joseph Yingling.)

hearing any groans or whistles or any exclamations from any of your passengers that would in any way indicate to you whether or not they were pleased or displeased with your driving?

A. Well, sir, as we passed the Boeing factory in Seattle, the group was singing almost constantly until we hit Fort Lewis. The only groans or moans I heard were when I made my sudden stop, [167] sir.

Q. Do you recall whether or not Mrs. Westfall asked you to turn the lights on more than once?

A. I would say at lease twice, sir.

Q. Were there any other remarks made to you by anyone other than those that you have mentioned as to Mrs. Westfall asking you to turn the lights on up until the time you made the sudden stop?

A. No, sir, no remarks.

Q. What type of highway is it between Seattle and Fort Lewis, a two-lane highway or four-lane highway?

A. Four-lane.

Q. Four-lane all of the way?

A. All of the way, sir.

Q. At the time that you made this sudden stop that you have mentioned, in what lane were you driving?

A. At the time I made the sudden stop, sir?

Q. Yes. A. In the left-hand lane, sir.

Q. That would be the lane nearest the center of the——

A. Yes, sir.

Q. What was the occasion for you to be driving in the left-hand lane rather than the right-hand lane?

(Testimony of Thomas Joseph Yingling.)

A. I believe there was a tractor and trailer parked on the right-hand lane, not quite off the road, on the soft shoulder, and I had to go out to the center lane [168] to pass him. And before I could slip into the right lane, a private car passed me on the right. As I was waiting for an opening to get back to the right-hand lane, I noticed this car coming from the left. I say when I noticed him, his front wheels were just over the center line.

Q. Where did this car come from?

A. Well, sir, he either came from a dirt road or a driveway. There was no red light or any indication of a stop for intersection. In order for me to stop the bus to avoid a collision, I applied my brakes momentarily to slow the speed of the bus down.

Q. Approximately how fast were you going at the time this occurred?

A. I would say between 20 and 25 miles an hour, sir.

Q. What was this other car that you speak of in the process of doing; was it crossing your—

A. No, sir. He was making a left-hand turn and his intention was to be going in the same direction that I was, sir.

Q. How far were you, as near as you can remember, from this other vehicle that you mention at the time you first observed it?

A. I would say 30 to 35 feet, sir.

Q. Will you state whether or not the application

(Testimony of Thomas Joseph Yingling.)

of your [169] brakes caused the bus to come to a complete stop? A. No, sir, it didn't.

Q. Now, prior to this time, had you had occasion to in any way notice the position that Mrs. Westfall was in, in the seat directly behind you?

A. Yes, sir, I did.

Q. What was that position she was in?

A. Well, sir, she was sitting on an angle, like her feet were towards the aisle.

Q. Her back then would be in what direction with respect to the bus?

A. To the left-hand side.

Q. And her right side would be in what direction with reference to the bus?

A. Right-hand side would be to the back of the seat, sir.

Q. Do you recall whether or not she had any music or anything else that she was examining?

A. Well, sir, at the time—I don't recall whether she had any music in her hand—but I know there was music on the seat alongside of her, sir. I believe it was necessary to get in this position in order to pass the music to the back of the bus.

Q. What happened when you applied your brakes to avoid hitting this car?

A. Well, sir, to my recollection I believe Mrs. Westfall [170] was thrown off the seat, and before I could stop the bus completely to offer assistance, whether Mrs. Westfall had help to get back onto the seat I don't remember, but before I could get over to the right and park my bus, she was already in

(Testimony of Thomas Joseph Yingling.)

her seat. I asked her if she was hurt and she said no, that she was not hurt. So I continued on my trip to Fort Lewis, and on the way I told her that I would stop at the dispensary at Section 1 of Madigan Hospital. When we arrived to Fort Lewis she refused to go to Section 1 dispensary, so we went to Service Club No. 1 where the USO show was to be put on. As we arrived at the Service Club, a PFC Moller who I believe had another trip earlier in the evening that went to another club, was there at Service Club No. 1. He and myself helped Mrs. Westfall from the bus. The hostess at the club, I believe, offered Mrs. Westfall an aspirin or an Alka-Seltzer or something to settle her nerves. I noticed no limp of any kind.

During the show it was general procedure to regas the bus and check the oil for the return trip. So I wasn't at the service club very long after we arrived.

Q. At the time you started back on the trip, will you state whether or not you returned to the service club? [171]

A. Yes, sir. I returned to the service club to pick up the group where I again Mrs. Westfall and this PFC Moller and this hostess, too, was almost insistent that she go. But she said it was all right, that it was a minor thing, that it couldn't be helped.

Q. You mentioned, I believe, that you insisted that she go somewhere; go where, what do you speak of?

(Testimony of Thomas Joseph Yingling.)

A. We insisted that she go to the dispensary.

Q. What kind of services were available at the dispensary?

A. At the dispensary there was a doctor on duty. He would have examined her as to whether she had broken limbs or sprains. He would have rendered her medical assistance. It was a regular dispensary.

Q. Will you state what Mrs. Westfall's attitude was with regard to that offer?

A. Well, sir, she said it wasn't necessary; that she was all right, and that it was late in the evening and she didn't want to hold the group up any longer; that the parents of the group would complain if they got back too late.

Q. Do you recall where it was that this sudden stop or sudden slowing down occurred with respect to any known landmark on the highway?

A. Well, sir, I believe after I left South Tacoma, as you approach a roller skating rink on the right; and on the [172] left was a riding academy. Whether the riding academy is still there, I don't know. But I believe this car came from a dirt road alongside of the riding academy.

Q. Now, the best of your recollection was that it was inside or outside of the City of Tacoma?

A. I believe it was outside of the city limits, sir.

* * *

Q. When I speak of city limits there, I believe I said city limits of Tacoma. What I would like to refer to is the city limits of South Tacoma; is

(Testimony of Thomas Joseph Yingling.)

that what you are referring to or to just the city limits of Tacoma?

A. Well, sir, I am not familiar with either the city limits of South Tacoma or of Tacoma. I don't recall where either of them are, sir.

Q. Will you state whether or not to your recollection you were in the city or out of the city?

A. I think I was out of the city, sir.

Q. If you had not applied your brakes in the manner in which you did, will you state whether or not in your opinion there would have been a collision?

A. Definitely, sir.

The Court: Do you recall whether you were approaching an intersection at the time of this——

The Witness: No, no intersection, sir. If I [173] remember rightly it was just a dirt road. It might only have been a driveway that went up to this academy. It may have went only fifty feet off the highway. I don't recall, sir. But it was definitely no intersection.

The Court: And that came from your left?

The Witness: From my left, sir.

The Court: And across the two lanes on the left-hand side of the highway?

The Witness: Yes, sir.

The Court: And across the center line?

The Witness: Yes, sir.

The Court: In front of you?

The Witness: Directly in front of me.

Q. (By Mr. Evans): How soon, before you slowed down suddenly as you described, before you were aware of the fact that Mrs. Westfall was no longer on her seat?

(Testimony of Thomas Joseph Yingling.)

A. Well, sir, I don't recall how long it was. But I will say I had gone maybe fifty feet before I noted she was on the floor, sir. The only way I noticed she was on the floor was by the passengers on the bus came forward.

Q. Why didn't you just immediately stop right there and investigate and see what had happened?

A. On account of the traffic, sir. [174]

Q. Will you state whether or not the traffic was heavy or light or how can you describe it?

A. I would say the traffic was just medium, sir. It was rather foggy, just in spots.

Q. Will you state whether or not you believe that you could have stopped with safety immediately upon your discovering that Mrs. Westfall had fallen from her seat?

A. Not with safety, no.

Q. What would have been unsafe about that?

A. Stopping in the left-hand lane, sir.

Q. After this incident and from there on in to the Post, will you state whether or not any remarks were made to you with reference to your driving?

A. No, there wasn't.

Q. By Mrs. Westfall or anyone else on the bus?

A. By no one on the bus, sir. [175]

* * *

Q. What is the maximum speed you attained in returning to Seattle?

A. I would say approximately 35, sir.

Q. Will you state whether or not you drove the same bus back you drove down?

A. Yes, sir, I did.

(Testimony of Thomas Joseph Yingling.)

Q. Did you state whether or not there was anything to indicate to you on the return trip whether or not the governor was operating?

A. The governor was still working, sir. That governor controls your speed in all forward gears. Take in third gear, I would say the top speed in third gear would be 18 miles per hour. When you reach that speed the bus just wouldn't go no faster on an incline or a hill or level stretch or which.

Q. How many forward speeds did this bus have?

A. Five, sir.

Q. In fifth speed what was the maximum you could get out of it? A. 35, sir. [176]

* * *

Cross-Examination

By Mr. Pennington:

* * *

Q. You say you talked to Mrs. Westfall immediately after the accident and offered to take her directly to the dispensary? A. Yes, sir, I did.

Mr. Pennington: Mrs. Westfall, will you stand up, please?

(Mrs. Esther Westfall stands before the Court.)

Q. (By Mr. Pennington): Is this the woman who was thrown from the seat on the bus to the floor? A. I believe she is, sir.

Q. Is she the woman whom you offered to take to the dispensary? A. Yes, it is.

Q. She appears to you now about like she did then?

(Testimony of Thomas Joseph Yingling.)

A. No, she is lighter in weight. The face is the only thing that is vaguely familiar, sir.

Q. How many times did you talk to her during the course of the evening? A. I would say five.

Q. About five different times? A. Yes.

Q. You think this is the woman definitely whom you [179] offered to take to the dispensary?

A. Definitely.

* * *

Mr. Pennington: Mrs. Bruck, will you stand, please?

(Mrs. Bruck stands before the Court.)

Q. (By Mr. Pennington): Do you recognize that woman? A. No, sir.

Q. Was she ever thrown from the seat of a bus which you were driving? A. No, sir.

Q. Did you ever offer to take her to the dispensary? A. No, sir.

Q. On the other trip you made from Seattle to Fort Lewis were any musical instruments on the bus?

A. That I don't know, sir. The troupe I picked up was a magician's.

Q. Did you have a ticket on that?

A. No, sir.

Q. You don't know anything about it?

A. I reported to the hostess at the USO club.

Q. You do not recognize this woman at all? [180]

A. No, sir.

* * *

Q. (By Mr. Pennington): Why is it that you

(Testimony of Thomas Joseph Yingling.)

would have a particular recollection of Mrs. Westfall's name on this trip and not of the other person on the other trip?

A. Mrs. Westfall was the one that was hurt and I have been contacted by the Bureau during the past four years.

Q. This other trip that you made to Seattle, was it before or after this particular trip?

A. I believe it was before, sir.

Q. About how long before?

A. Well, I would say maybe a month, sir. [181]

* * *

Q. How many of those were new buses?

A. I would say most of them were, sir. We had a bunch of old buses but we wouldn't use them on such a long trip.

Q. How long had you had these new buses in the motor pool?

A. I would say approximately a week, sir.

Q. About one week? A. Yes.

Q. And before that what had you had?

A. We had some old buses.

Q. And you had used the old buses prior to that?

A. Yes, sir. [182]

* * *

Q. Yes; before you left on the trip to Seattle you made a 1st echelon inspection? A. Yes, sir.

Q. And this vehicle did have a governor on it?

A. Absolutely, sir.

Q. You stated that those governors are sealed with two spring wires and a lead seal, is that correct? A. Yes.

(Testimony of Thomas Joseph Yingling.)

Q. To prevent their being opened and readjusted? A. Yes, sir.

Q. Is there any other way that you can adjust those governors? A. No, sir. [183]

* * *

Q. Were these vehicles—especially with respect to governors were they inspected regularly by your superiors at the motor pool? A. Yes, sir.

* * *

Q. I am speaking with particular reference to the governor, Mr. Yingling—to see that they were functioning properly?

A. Yes, sir, they were tested regularly.

Q. That they had not been unsealed?

A. Yes, sir.

Q. Do you know whether or not it was a common practice among soldiers in the Army, at that time, to readjust their governors so they could drive at whatever speed they wanted to?

A. No, sir, I don't.

Q. Mr. Yingling, you stated that you were a driver in the Army for 27 months, did you not?

A. Not quite 27, sir.

Q. Well, during most of your time in the Army, you stated, you were a driver?

A. Yes, sir, I was. [184]

* * *

Q. You stated this was a new truck and the brakes were grabby; what do you mean by that?

A. I wouldn't say they were grabby. I would say

(Testimony of Thomas Joseph Yingling.)

I was just unfamiliar with the brakes at the time I made the trip.

Q. You used that expression, that they were grabby? [186] A. Yes, sir.

Q. What did you mean by that; did you mean they would stop suddenly?

A. The slightest pressure with your foot would stop them, sir.

Q. And you had some difficulty in that respect with this vehicle while you were en route to Seattle?

A. While I was en route to Seattle, yes, sir.

Q. And on the return trip?

A. No, sir, I had no difficulty.

Q. It was gone by then?

A. Yes, sir; I imagine that my trouble on the way over was that my brake was just a little bit too fast. This hydraulic booster is the same as an air brake almost. It will stop a truck on a dime or slide the rear wheels. And being a new bus and used to driving just trucks and old buses, I was unfamiliar with the brakes. [187]

* * *

Q. Did you make your report of this accident?

A. No, sir.

Q. Why didn't you; don't Army regulations require that?

A. Yes, sir; if the person was injured. But it was just such a slight incident that it didn't seem like it was necessary to report it.

Q. Then why did you insist on so many repeated occasions that she go to the dispensary?

(Testimony of Thomas Joseph Yingling.)

A. Well, sir, it was the custom to insist.

Q. If anybody was injured or possibly injured?

A. Yes, sir. [188]

Q. You assisted her in alighting from the truck when you arrived at Fort Lewis?

A. Yes, sir, I did.

Q. Why did you if it was a slight incident and not injured?

A. She was still nervous from the stop, sir.

Q. So nervous that she required assistance from the truck?

A. Well, sir, she was a heavy woman, and I always assisted older women than I am, sir. It is a custom.

Q. Do you now whether she was thrown from the seat or not?

A. To my estimation, I believe her arm went over the top of that bar; actually, she didn't go all of the way to the floor outside of maybe one knee.

Q. You stated that during the course of this trip you heard no groans or moans, I believe was the expression you used? A. That is right.

Q. Except when you made your sudden stop?

A. That is right.

Q. Is that the time at which she was thrown forward from her seat? A. Yes, sir. [189]

* * *

Q. When you made this sudden stop, you applied your brakes? A. Yes, sir.

* * *

Q. Then you didn't make a sudden stop?

(Testimony of Thomas Joseph Yingling.)

A. I made a sudden stop but never came to a complete stop, in other words.

* * *

Q. You stated, as I understood it, that when you passed this tractor and trailer, you had moved to the left-hand lane or the inside traffic lane?

A. Yes, sir.

Q. How far back down the highway was that from the point at which you did your sudden braking?

A. That I don't recall, sir.

Q. Well, approximately what distance to give me an idea?

A. Well, maybe 150 feet.

Q. Then why didn't you pull back to the right-hand lane?

A. Another vehicle passed me on the right, sir. [190]

Q. But it had already passed you before you braked?

A. Yes, sir; it had.

Q. The car which came in front of your bus was coming from your left?

A. Yes, sir.

Q. And it was making a left-hand turn into the same traffic lane which you were following?

A. Yes, sir.

Q. Why didn't you pull into the right-hand lane at that time instead of braking suddenly?

A. Well, sir, after I passed this tractor and trailer I was manipulating to get into the right-hand lane, at the time, when this other vehicle passed me on the right. And while I was still looking for an opening to get into the right-hand lane, this other vehicle came out from the left.

(Testimony of Thomas Joseph Yingling.)

Q. Did the other vehicle have its lights burning?

A. Yes, sir, he did.

Q. Why didn't you see it when it pulled out into the highway?

A. That is an awfully wide highway, sir.

Q. That is a four-lane highway, I believe you said?

A. Yes, sir.

Q. That is the ordinary thoroughfare or arterial highway?

A. Yes. [191]

Q. Did you see this other car pull onto the highway?

A. No, sir; I didn't.

Q. What kind of weather conditions did you have that evening?

A. Just foggy in spots; mostly the hollow spots. The amber lights on the highway were lit.

Q. Well, they are always lit, I believe, at night. Was it raining?

A. No, sir. [192]

* * *

Q. You are familiar with the business district of South Tacoma?

A. Not very, sir.

Q. Are you positive you had gone through the business district?

A. Absolutely, sir.

Q. Do you know whether that business district known as South Tacoma is within the city limits of the City of Tacoma or not?

A. No, I don't know.

Q. From the business district known as South Tacoma, how far had you gone before the accident occurred?

A. I would say two miles.

Q. Two miles from that point. You were traveling in what direction?

(Testimony of Thomas Joseph Yingling.)

A. Towards Fort Lewis, sir. [194]

* * *

BERNARD E. McCONVILLE

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

* * *

Q. Will you state your qualifications as a doctor, please?

A. Graduate from the University of Nebraska Medical School in 1936; interned at Providence Hospital in Seattle; post graduate course, University of California and Harvard University; and assistant and associate to Dr. H. T. Buckner for the past fourteen years.

Q. Will you state whether or not you are presently licensed to practice in the State of Washington?

A. Yes, sir.

Q. What if any specialty do you have?

A. Orthopedic surgery.

Q. Will you state whether or not you have examined Mrs. Westfall at my request?

A. Yes, sir. She was examined on October 3, 1950.

Q. Will you state the complaints which Mrs. Westfall gave to you with regard to her condition?

A. The first was persistent pain of the low back. She states that her back aches almost con-

(Testimony of Bernard E. McConville.)

stantly; two, that pain of the back is increased with prolonged standing; three, that she has swelling of the left ankle increased with use; four, she has throbbing, aching pain of the left ankle and lower leg; five, the pain of the ankle is increased with changes of the weather; six, because of pain of the ankle she favors the use of her left leg; seven, she has stiffness and limited function of the left ankle joint.

Q. Will you state whether or not you caused any X-rays to be made?

A. Yes, sir. I took X-rays of both ankles for comparison. I took X-rays of her back.

Q. Do you have those X-rays with you there now? A. Yes, sir.

Mr. Evans: I would like to have them marked for identification, please. [196]

(X-rays marked as Defendant's Exhibits G, H, I, J, K and L for identification.)

Q. (By Mr. Evans): Can you tell the Court the things which you did in the course of your examination of Mrs. Westfall with regard to having her perform certain functions and what the results of those activities indicated to you?

A. She was given a thorough physical examination with particular emphasis on the orthopedic phase. The general physical examination was not remarkable. The examination of the back, there was noted an increase in both the dorsal and the lumbar curves of the back. In other words, the curvature of the back is increased. Some tender-

(Testimony of Bernard E. McConville.)

ness was elicited over the low back portion, over the sacro-iliac region. I found no evidence of muscle spasm and the patient was able to bend forward to within six inches of the floor. Her backward bending, lateral bending and rotation of the spine were within normal limits. She was able to stand on her left foot and raise up on the toes and she was able to stand on the right foot and raise up on the toes. She was able to assume a full squat and to recover without difficulty. She was able to stand in the straddle position, and sway her hips from side to side or rotate them without difficulty. [197]

In lying down in the prone position she was able to contract the muscles of her spine equally. She could raise both legs from the table without difficulty. She could raise her chest and the legs from the table without difficulty. The contractures of the muscles of the back during this examination were equal and normal.

Q. I believe you made a statement to the effect that both the dorsal and the lumbar curves had increased. Can you state whether or not that condition might be caused from having previously had a weight of somewhere around 250 pounds?

* * *

A. The weight would be a factor in it. The increase in those curves are due to posture.

Q. (By Mr. Evans): As a result of that examination, what are your conclusions as to the condition of her back?

A. My conclusion from my examination on the

(Testimony of Bernard E. McConville.)

date of October 3, 1950, was that she had a normal functioning back with the pain factor based primarily on the posture. [198]

Q. Do you consider her posture as good or bad?

A. Bad.

Q. With regard to Mrs. Westfall's being able to bend within six inches of the floor; will you state whether or not that is considered a good or bad condition, considering her age?

A. I think that is a very good range of motion.

Q. I believe you stated that lying on her stomach she was able to extend both of her legs and chest, is that correct?

A. Yes, sir.

Q. Will you tell us whether or not that is a good or bad condition, considering the plaintiff's age?

A. It is good—it is a very good range considering age. It is very good for anyone to be able to extend both the legs and the chest at the same time.

Q. With regard to the statement you made of being able to put all of her weight on either her right or left foot and raise to the toes without difficulty; would that phase of the examination indicate anything to you with regard to whether or not there was any injury to her ankle or back?

A. Well, it speaks in favor of both her back and her ankle to be able to bear the full weight of the body on one [199] leg. If there is excessive difficulty or trouble in the back, they have difficulty in putting the full weight on one side because it shifts the normal weight bearing load.

(Testimony of Bernard E. McConville.)

By the same token, if there is an injury any place down along the leg, it is most difficult for them to throw the full weight of the entire body on that part without some complaint.

Q. With regard to your examination of Mrs. Westfall's ankles, and particularly her left ankle, will you state what if anything you found with regard to that examination?

A. The legs were measured both in length and circumference, taken at definite levels so that the measurements would be at equal levels. The thighs were found to measure 22 inches equally. The knees measured $15\frac{1}{2}$ inches equally. The measurements of the lower legs showed a quarter-inch variation on the left; the right measuring 15 and the left $15\frac{1}{4}$. There was noted a varicosis of both lower legs. It was also noted that the ankles measured 11 inches equally. There was no variation by measurements. Also, the feet measured $10\frac{3}{4}$ inches equally. There was noted a second degree type of flat foot with a pronation of the foot. The reflexes in testing the motor [200] reflexes of the lower legs, they were all present and they responded equally; there were no abnormal reflexes.

There was no variation to pinpoint or soft touch examination for the sensation. She was able to raise her legs to 90 degrees bilaterally. There was no clinical variation by observation of either the left or the right ankle. The patient complained of some generalized tenderness of the ankle upon palpation. The Patrick's test, rotation test, and the leg thrust test produced some pain which she

(Testimony of Bernard E. McConville.)

located in the region of the lumbo-sacral joint.

X-rays were taken of both the left and right ankle for comparisons. These X-rays showed a clear joint surface and there was no evidence of either old or recent bony injury or bony pathology.

Q. If there had been an injury some four to five years ago which had been bothering her appreciably all during this period of time, would you state whether or not in your opinion some evidence of that would have shown up in an X-ray?

A. Well, if a joint has been injured over a period of years and there has been persistent symptoms, you would normally expect to see some variation in the X-ray films. In other words, you would expect to [201] pick up a traumatic arthritis of the joint.

Q. Handing you the X-rays which I believe are Exhibits G to L, can you pick out among those which are the X-rays of the ankles?

A. These are the X-rays of the ankles (indicating).

Q. That is Exhibits K and L?

A. K and L. Exhibit K—this is an X-ray taken of the right ankle from front to back and also from side to side. This ankle presented a normal ankle joint surface. It was taken as a comparison for the film taken of the left ankle which again was taken in both the front to back and side to side views. This X-ray also showed a normal appearing joint surface and compared the same with that of the right.

(Testimony of Bernard E. McConville.)

Mr. Evans: I would like to offer Exhibits K and L.

Mr. Pennington: No objection.

The Court: K and L may be received.

(Defendant's Exhibit K received in evidence.)

(Defendant's Exhibit L received in evidence.)

Q. (By Mr. Evans): With regard to the other X-rays you have there, what portions of the body are the X-rays of?

A. These four remaining X-rays, starting with Exhibit [202] H—this is an X-ray taken from front to back of the lower part of the back, starting from the lower ribs and including the upper margins of the hip joints.

Q. Is there anything in that X-ray that indicates any deformity or any injury to you?

A. No, sir. Exhibit G—we can take Exhibit G and Exhibit J. These X-rays are two X-rays taken at an oblique view. In other words, they are not quite a side to side view nor are they a front to back view; it is an angle taken in between, strictly an oblique view. They visualize the articulating joints of the back. I was unable to demonstrate anything abnormal from that.

Exhibit I was an X-ray taken from side to side. This X-ray showed an increase in the lumbo-sacral angle and also it showed a slight hypertrophic list-
ing of the third lumbar vertebra.

The Court: Could that be due to trauma?

The Witness: Possibly. It could possibly be due

(Testimony of Bernard E. McConville.)

to the normal findings of a back of 45 years of age.

Mr. Evans: I offer Exhibits E, F, G, H, I and J in evidence.

The Court: They may be received.

(Defendant's Exhibits G, H, I, [203] and J were received in evidence.)

Q. (By Mr. Evans): From your examination as to the ankle, could you find any evidence of residual injury to the ankle—to the left ankle?

A. No, sir.

Q. Now as to the back, if there were an injury back in 1946, have you considered it sufficiently to be able to state any percentage of the injury to the comparison of the normal functioning back?

A. From the range of motion presented by the patient and the freedom of motion presented by the patient, considering the fact of the patient's complaints, and giving the patient the benefit of the doubt from a possible muscle or ligamentous injury to the low back area, I would say from my examination that her disability resulting, if any, should not exceed a five per cent permanent disability compared with a normal functioning back.

Mr. Evans: You may cross-examine.

Cross-Examination

By Mr. Pennington:

Q. Doctor, in stating the condition of the back and ankle as reflected by the X-rays taken by you, a few [204] minutes ago, was your reference to the findings as to the bone structure?

(Testimony of Bernard E. McConville.)

A. Of these?

Q. Yes.

A. Yes; this is an interpretation of the X-rays themselves.

Q. In so far as the bone structure of the back and ankles is concerned?

A. In so far as the bone structure is concerned, yes, sir.

Q. Considering the type of injury which Mrs. Westfall apparently sustained—that is, a severe sprain of the ankle and back, affecting the ligaments and muscles——

A. Yes, sir.

Q. ——would that necessarily be reflected in X-rays of that kind?

A. No, sir.

Q. Dr. McConville, you have never treated this plaintiff, have you?

A. No, sir.

Q. And this examination was made of her at the request of the Government?

A. Yes, sir.

Q. For the purposes of presenting testimony to this Court as to your findings in this action? [205]

A. I imagine so, yes, sir.

Q. When you expressed your opinion as to a possible disability of five per cent, would you say that is or is not subject to variation in either direction, more or less?

A. In my opinion it was not to exceed that. I felt that there would be some variation from no disability to five per cent figuring on the basis of——

Q. That was on the basis of your opinion and not a firm and fast fact?

A. There is no firm and fast fact in [206] medicine.

THOMAS JOSEPH YINGLING

having been previously sworn, resumed the stand for further examination and testified as follows:

Cross-Examination
(Continued)

By Mr. Pennington: [207]

* * *

Q. With reference to the inside of these buses, did they have the vertical and horizontal protection rails in the old buses? A. Yes, sir.

Q. All of them? A. All of them, sir.

Q. There were no buses in that pool that did not have a vertical and horizontal protection in front of them, facing the left front seat?

A. No, sir. [208]

* * *

Q. Did you state that Mrs. Westfall was seated with her back to the window? A. Yes, sir.

Q. With her feet on the seat? A. No, sir.

Q. How then was she sitting?

A. She was on the right-hand side of the seat.

Q. She wasn't seated next to the window?

A. No, sir; her back was just facing the window.

Q. Where were her feet and legs?

A. I imagine they were towards the aisle, sir.

Q. Was there a guard rail protecting the end of the seat? A. Yes, sir.

Q. How did she have her feet and legs toward the aisle?

A. Well, sir, she could have one foot between one part of the pole and one foot between the other part of the pole.

(Testimony of Thomas Joseph Yingling.)

Q. I mean is there a hand rail on the seat?

A. No, sir. [210]

Q. There is no hand rail over the end of the seat?

A. No, sir. I don't believe there is even an arm rest on the seat.

Q. Did she have her feet and legs completely around the end of the seat or angled towards the front?

A. I would say they were more or less angled towards the front of the bus.

Q. How far out toward the left-hand side of the bus did this rail which you state was there extend?

A. I would say at least 14 inches.

Q. Then it did not extend as far out as the seat extended? A. I don't get your point.

Q. The horizontal rail in front of the seat occupied by Mrs. Westfall, did it begin at the left-hand side of the bus?

A. Yes, sir, at the wall.

Q. How far out towards the center of the bus did it extend?

A. I would say to within a foot of the center of the bus.

Q. Then it was about the same length as the seat occupied by Mrs. Westfall? A. Yes, sir.

Q. And you said she had sheet music on the seat beside her? A. Yes, sir.

Q. On which side of her? [211]

A. On the left of her, sir.

Q. What was she doing with that sheet music?

A. Well, there was someone in the group that

(Testimony of Thomas Joseph Yingling.)

played an accordion. She was sorting the music, picking out certain numbers that this person wanted to play at Fort Lewis.

* * *

Q. How far were you from this point at which this car followed you before you saw the car? [212]

A. I would say 35 to 40 feet.

Q. From the point at which it crossed the road?

A. Yes, sir.

Q. How fast were you driving?

A. Between 20 and 25. [213]

* * *

Redirect Examination

By Mr. Evans:

Q. Mr. Yingling, do you recall what the condition of the highway was at the scene where you made this rather abrupt slowing down, as to being level or up or down hill?

A. I believe it was an upgrade, sir.

Q. Can you give us your best estimate as to how steep the grade was?

A. Well, sir, I would say in 200 feet that the grade didn't go up no more than four foot, sir.

Q. Well, four feet in 200 feet, for practical purposes would you say that was almost level?

A. No, sir, I wouldn't say it was almost level. [215].

Q. Do you recall whether or not there was any oncoming traffic which was headed in a general northerly direction at the time of this occasion?

(Testimony of Thomas Joseph Yingling.)

A. Yes, sir, there was. That is the reason why this other car crossed into my lane at the time he did. If he would have stayed where he was, I imagine the oncoming traffic would have hit him. Because he made a rather hasty move and then he had to stop, and then I imagine with this other traffic coming towards him, he had to get out of the way. It was a rather hasty move on his part. [216]

* * *

Recross-Examination

By Mr. Pennington:

Q. Mr. Yingling, have efforts been made during the course of the last three or four years to contact you concerning this claim of Mrs. Westfall?

A. Yes, sir.

Q. Has the question ever been raised as to whether you were or were not the driver of the bus at the time of this injury?

A. No. They just assumed that I was the driver when they contacted me, sir.

Q. They assumed so; but has there ever been any question raised as to whether or not you were the driver on this particular date?

A. Well, sir, I was the driver. I remember the incident where the woman was thrown from the seat.

Q. Has the question ever been raised as to whether or not you were the driver at the time of this particular accident?

A. No, sir.

(Testimony of Thomas Joseph Yingling.)

Q. By anyone who interviewed you it has never been raised in any way? A. No.

Q. You do not recall the date of this accident?

A. No, sir. [217]

* * *

BEVERLY BRUCK

called as a witness, by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

* * *

Q. You are the daughter of Mrs. Bruck who testified for the plaintiff here earlier in this trial?

A. Yes.

Q. Will you state whether or not you were a passenger on this particular bus that we have had reference to in this trial? A. Yes, I was.

Q. Where were you seated on that bus?

A. I was seated exactly behind Mrs. Westfall.

Q. That would be the second seat from the front on the left-hand side? [219]

A. No. I was right behind her on the right-hand, on the aisle side.

Q. I don't believe I quite understand.

A. I was in the second seat on the right-hand side by the aisle. I was sitting right on the aisle side.

Q. Were you sitting in the seat directly behind Mrs. Westfall? A. Yes.

(Testimony of Beverly Bruck.)

Q. Would that be in the double set of seats on the right-hand side of the bus or on the left-hand side of the bus?

A. On the left-hand side of the bus.

Q. You were sitting next to the aisle?

A. Yes.

Q. Mrs. Westfall was right in front of you?

A. No. She was by the windows.

Q. Did Mrs. Westfall talk to you at any time during this trip? A. Yes, she did.

Q. What was her position in the bus as she was driving along with regard to the way she was seated?

A. She was turned just slightly—just very slightly and with her feet on the floor.

Q. Could you see her feet?

A. No; but they must have been there because they were [220] hanging over the front of the seat.

Q. Will you state whether or not she had her back towards the window?

A. She didn't have her back; she just had her left shoulder.

Q. Do you recall an interview which you had with Mr. Kail here on August 7, 1950?

A. Yes.

Q. Did you talk to him about this accident?

A. Yes, I did.

Q. Did you give him a signed statement of your recollection as to how Mrs. Westfall was sitting in the bus at that time? A. Yes.

(Testimony of Beverly Bruck.)

Mr. Evans: I would like to have this marked for identification.

(Document, signed statement of Beverly Bruck, marked as Defendant's Exhibit M for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit M, will you examine that and tell me whether or not your initials appear anywhere on the first page? A. Yes, they do.

Q. In one or two places? [221] A. Two.

Q. Will you look at the second page and tell me whether or not that is your signature there?

A. Yes, it is.

Q. And at the time you signed that, do you believe that the statements set forth in there were the truth? A. Yes.

Q. Will you read to yourself, starting with the third paragraph; will you read the third paragraph to yourself?

A. (Witness reads document to herself.)

Q. Didn't you state in that paragraph that Mrs. Westfall was sitting with her back towards the window? A. Yes, I did.

Q. And that is the truth, isn't it?

A. Yes, it is the truth, but she wasn't sitting exactly with her whole back against the window.

Mr. Evans: I would like to offer Defendant's Exhibit M.

Mr. Pennington: No objection.

(Testimony of Beverly Bruck.)

(Defendant's Exhibit M was received in evidence.) [222]

DEFENDANT'S EXHIBIT M

Seattle,

Aug. 7, 1950.

I, Beverly Bruck, make the following statement to Edward J. Kail Jr who has identified himself to me as a Special Agent of the Federal Bureau of Investigation. No threats or promises have been made to me to make this statement.

I am 15 years old and at the time of the accident I was 11 years old.

I was a dancer with the U.S.O. Unit, headed by Mrs. Westfall.

On Feb. 20, 1946, I was sitting directly behind Mrs. Westfall, while we were en route to Ft. Lewis to perform at one of the Service Clubs. During the trip Mrs. Westfall was sitting sideways in the seat with her back toward the window and had talked to me during the trip.

When the driver came to an abrupt stop Mrs. Westfall slid off the seat onto the floor directly in front of the seat. I do not recall any bar being in front of her.

I have read the above and have found it to be true and correct to the best of my knowledge.

/s/ BEVERLY A. BRUCK.

(Testimony of Beverly Bruck.)

Witnesses:

/s/ EDWARD J. KAIL JR.,
Special Agent, F.B.I.,
Seattle.

Admitted January 10, 1951.

Cross-Examination

By Mr. Pennington:

Q. Miss Bruck, how old are you now?

A. 16.

Q. How old were you at the time this accident occurred?

A. 11.

Q. Will you elaborate just a little bit further, Miss Bruck, on the question asked with reference to the third paragraph of your statement there as to just how Mrs. Westfall was seated at the time this accident occurred?

A. Well, from the best I can recall, she was sitting in the first seat on the left-hand side, right in back of the driver—the seat right in back of the driver, and by the windows; and she was slightly turned.

Q. Will you demonstrate in the chair occupied by you how she was seated in this seat?

A. I would sit like this (indicating).

Q. Turned slightly to the right?

A. Yes, slightly.

Q. Did she have her legs up in the seat?

(Testimony of Beverly Bruck.)

A. Not that I recall.

Q. They were facing forward from the seat?

A. Yes.

The Court: Was she conversing with people to her rear? [223]

The Witness: Yes. She would turn like this to me and talk to me.

Q. (By Mr. Pennington): At the time of the accident? A. No, I can't recall that.

Q. You mean during the course of the trip she had spoken to you or asked you different questions?

A. Yes.

Q. Was she thrown from the seat at the time this accident occurred? A. Yes.

Q. Was this at an intersection?

A. To the best I can recall, yes.

* * *

Q. Was she thrown to the floor? A. Yes.

Q. Was there either a vertical—up and down—or horizontal rail in front of the seat occupied by Mrs. Westfall.

A. Not that I can recall. [224]

* * *

Q. Is your recollection definite as to whether or not there were any rails in front of the seat occupied by Mrs. Westfall? A. No.

Q. I say do you recall definitely whether there was or was not? A. No, there weren't. [225]

* * *

AUSTIN A. SPEERES

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

* * *

Q. Where are you employed?

A. Fort Lewis, Washington.

Q. In what capacity?

A. Automotive maintenance superintendent.

Q. How long have you been so employed?

A. Five years.

Q. Will you state whether or not your employment has been in a civilian capacity or as a member of the armed services?

A. A civilian capacity.

Q. What experience have you had in the automotive maintenance business?

* * *

A. I have been a mechanic, foreman and supervisor, for the last twenty years. [226]

Q. (By Mr. Evans): Will you state whether or not you are familiar with the operation of what is known as a K-7 International bus as used by the Army? A. Yes, I am.

Q. Will you state whether or not you know of your own knowledge a governor is an integral part of such a bus? A. It is; yes, sir.

Q. Do the technical manuals given with this type

(Testimony of Austin A. Speeres.)

of bus have anything in them which will in any way substantiate what you have just told us?

A. Yes, sir; they do. The M-9-222 in that particular bus pertains to the maintenance and overall care of that vehicle.

(Manual marked as Defendant's Exhibit N for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit N, will you state whether or not you can identify it? A. Yes, I can.

Q. Without revealing its contents, would you tell us what it is?

A. Yes; it is a TM or Maintenance Manual pertaining to two different types of vehicles with the same type engine and general chassis.

Q. Will you state whether or not this technical manual [227] deals with a K-7 International bus?

A. It does; yes, sir.

Q. Will you state whether or not that is a War Department publication? A. It is.

Q. Will you state whether or not it has as its purpose directions and general technical data with regard to the maintenance of a K-7 International bus? A. Yes, sir; that is it.

Q. Will you state whether or not that is a publication that you in your business are required to follow? A. That is right.

Mr. Evans: I offer Exhibit N.

Mr. Pennington: No objection.

(Testimony of Austin A. Speeres.)

(Defendant's Exhibit N was received in evidence.)

Q. (By Mr. Evans): Will you look at page 145 of that manual? A. 45 or 145?

Q. 145, please. A. All right.

Q. Will you state what you find there with regard to whether or not a governor is an integral part of the engine on the K-7 International bus?

A. It is, yes, sir. [228]

Q. What are the specific words, reading from the book, that you find there?

A. The data as regards the carburetor on this particular vehicle, "Make: Zenith; Series 30BW-11-R; Outline Number: 9994; Type; Downdraft; Governor: Integral."

Q. Will you state whether or not you are familiar with the operation of the particular type of governor that is on this vehicle?

A. Yes, sir, I am.

Q. Will you state whether or not there are any pictures in that manual on about page 145 or a page or two in either direction which show this particular governor? A. Yes, sir there are.

Q. Do those pictures show other portions of the carburetor other than the governor?

A. Yes. They show the position of the governor in relation to the carburetor.

Q. So that we may know for certain what you are referring to, would you mind taking this red pencil and circling on those pictures that portion

(Testimony of Austin A. Speeres.)

of the picture which shows the governor and tell us what page you are making those circles on?

A. Pages 146 and 147 both concern the governor in relation to the carburetor; and they show the position of the governor. [229]

Mr. Evans: May the record show that the witness has so marked in red circles certain portions on pages 146 and 147 of Exhibit N.

Q. (By Mr. Evans): Will you state, Mr. Speeres, whether or not there are any precautions taken with regard to a governor to insure its remaining in the position in which it is initially fit?

A. Governors are always sealed with a seal of one kind or another. This particular governor has two seals on it due to the fact that you can adjust it in two different places, in two different manners.

Q. What is the seal?

A. On this particular governor they are wire with a flat, round lead seal on the wire itself.

Q. Is it possible to adjust or alter the seating on the governor without breaking those seals?

A. Not at all.

Q. Will you state whether or not a governor is a part of these vehicles when they are manufactured and delivered to the Army?

A. Yes, sir; that is part of Army specifications.

Q. Can you tell the Court the purpose which this governor serves?

A. It directly affects the speed of the engine and thereby the speed of the vehicle. [230]

Q. What if anything does the governor control?

(Testimony of Austin A. Speeres.)

A. The flow of gas into the engine from the carburetor.

Q. What is the effect of that control?

A. It restricts the flow of gas after a certain point; the governor allows a certain portion of gas to flow from the carburetor into the engine up to a given volume; and then it simply shuts it off at that point.

Q. Will you state whether or not that has any effect upon the maximum rpm which the motor can attain?

A. Yes, definitely. Governors can be set at any speed above idle speed up to what is considered maximum speed of the engine.

Q. What is the speed at which these governors are supposed to be set when they come from the factory? A. 3,000 rpm.

Q. What if any effect does that have upon the speed which the vehicle can attain?

A. It regulates the speed of the vehicle as a whole depending on the gear that the transmission is in at the time of travel.

Q. At the fastest speed that the vehicle can have, what is the maximum speed?

A. Fifth speed as delivered from the factory would be 45 miles an hour.

Q. At 3,000 rpm? [231] A. Yes, sir.

Q. So that would be the maximum speed this vehicle could travel as it is delivered from the factory? A. Yes.

Q. Do I understand you to say 45 miles an hour?

(Testimony of Austin A. Speeres.)

A. That is factory specifications.

Q. For the governor?

A. That is right, sir.

Q. Will you state whether or not before vehicles are delivered to the troops, whether or not any tests are made with the governors to determine their accuracy?

A. Yes, sir. The vehicle itself is processed to make sure it is completely serviceable and ready for issue to the troops. The governor at that time is set at the local regulation for speed concerning that vehicle.

Q. What would have been the speed that a new vehicle issued at the time mentioned here would have had its governor set for?

A. Irregardless of the age of the vehicle, all buses and like vehicles are set at 35 miles an hour.

Q. Are you aware of any Army regulation requiring such a setting? A. Yes, sir, I am.

(Pamphlet of Army regulations marked as Defendant's Exhibit O for identification.) [232]

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit O, will you state whether or not you can identify it without revealing the contents?

A. Yes, sir; I can.

Q. What is it?

A. Army Regulation 850-15.

Q. Will you state whether or not that is a War

(Testimony of Austin A. Speeres.)

Department publication? A. It is, yes, sir.

Q. Will you state whether or not that publication is binding and controlling over the operation of vehicles at Fort Lewis in February, 1946?

A. Yes, sir, it was.

Mr. Evans: I offer the exhibit in evidence.

Mr. Pennington: No objection.

(Defendant's Exhibit O was received in evidence.)

Q. (By Mr. Evans): Will you turn to page 11, paragraph 27 (d) of Exhibit O and read what it says there to the Court?

A. Paragraph (d): "On all motor vehicles except ambulances, crash trucks, fire trucks, and other vehicles for similar emergency use, regulated governors, when installed, will be set and sealed at the maximum speed [233] indicated on the caution plate. The setting of governors or other speed or pressure relating devices on fire or crash trucks or other vehicles in which the propelling engine is also used to drive mounted equipment will be based upon the limiting maximum speed for driving or operating purposes as determined by the vehicle design. Disciplinary action will be taken in all cases of tampering with sealed governors."

Q. With a governor on a K-7 International bus set for 35 miles per hour, what is the maximum speed, based on your experience, in your opinion, that could be attained?

A. Downhill, remaining in gear, of course, it

(Testimony of Austin A. Speeres.)

could attain a speed of approximately 38 miles an hour.

Q. How can you account for it going three miles an hour faster than the governor is set for?

A. Downhill, the momentum, the weight of the vehicle would cause a certain amount of slippage within the engine itself. In other words, the engine would be forced to turn up higher than its maximum rpm.

Q. On a level run without any hills to affect it one way or another, what would be the maximum speed the vehicle would attain?

A. 35 miles per hour, one mile give or take.

Q. With this particular type of vehicle, a K-7 International, [234] if there were no governor on it at all, what would be the maximum speed it could attain?

A. The maximum speed of a K-7, with no governor, possibly around between 45 and 48 miles an hour.

Q. Will you state whether or not the engine and the gears are designed for it to go any faster than that?

A. No sir, they are not.

Cross-Examination

By Mr. Pennington:

Q. When were you first employed at Fort Lewis, Washington, Mr. Speeres?

A. I was first employed in March of 1946.

(Testimony of Austin A. Speeres.)

Q. You were not there in the month of February, 1946? A. No, sir; I was not.

Q. You are not familiar with the bus that was involved in the accident of which this case is concerned? A. Not at all.

Q. You had no connection whatever with the motor pools or maintenance departments of Fort Lewis at that time? A. Not at all.

Q. You stated that the governors with which vehicles of this type, the K-7, came equipped, had two seals? A. That is right. [235]

Q. At either point the adjustment could be changed? A. That is right.

Q. In your experience as superintendent of maintenance there at Fort Lewis, have those ever been tampered with by military personnel?

A. Oh, yes; that is right.

* * *

Q. It is necessary to maintain inspections or checks to see that they are kept in the proper order?

A. Periodically. [236]

* * *

Redirect Examination

By Mr. Evans:

Q. At the time you arrived at Fort Lewis in March of 1946, what kind of buses did they have at Madigan General?

A. I wasn't directly connected with Madigan General. I was connected with what they called

(Testimony of Austin A. Speeres.)

the Post Motor Pool who furnish vehicles for all activities, and at that time they had K-7 buses in addition to several other types.

Q. Have you ever known of a K-7 International bus that did not have the vertical and horizontal guard rails behind the driver?

A. No, sir, to my knowledge; I have never seen one without it.

Mr. Evans: No further questions.

Recross-Examination

By Mr. Pennington:

Q. When you speak of the K-7 coming from the factory equipped with the governor, you are speaking in reference to those vehicles ordered by and built to military specifications, are you not?

A. Naturally, yes.

Q. Do you know whether or not the Army ever owned vehicles [238] that were not so made to Army specifications? A. Oh, yes, they do.

Q. They do own many vehicles which are not made to Army specifications?

A. That is right.

* * *

EDWARD J. KAIL

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans: [239]

* * *

Q. Where are you employed, Mr. Kail?

A. I am a special agent with the Federal Bureau of Investigation. [240]

* * *

Cross-Examination

By Mr. Pennington:

* * *

Q. Did you also make an effort to ascertain who was the driver of the vehicle involved in this accident on February 20, 1946? A. Yes, sir.

Q. Did you ascertain who was the driver?

A. Yes, sir.

Q. By what means did you ascertain who was the driver?

A. I ascertained the means through the reports at Fort Lewis with regard to this accident.

Q. You wouldn't happen to have those reports with you? A. No, sir.

Q. Copies of them? A. No, sir. [241]

Q. What information did those reports provide as to who was the driver?

A. They merely stated that Mr. Yingling was the driver.

(Testimony of Edward J. Kail.)

Q. But there was no trip ticket connected with it to verify it?

A. There was no trip ticket connected with it, no, sir.

Q. Did it specify in those reports that date?

A. The date of the accident, sir?

Q. Yes. A. That I can't recall.

Q. At any time during the course of your investigation was another accident brought into the matter in any way which happened at or near the time of this accident? A. No, sir.

Q. Was there ever a question raised as to whether or not Mr. Yingling or another might have been the driver at the time of this particular accident? A. No, sir.

Q. That question was never raised in any way?

A. No, sir.

Q. Did you ever state to any of the witnesses involved in this case or any of the people whom you have interviewed in connection with it that as of two or three months previously the Army or you had not as yet been able to locate the driver of this bus? [242] A. Not that I recall, no, sir.

* * *

Q. Did you ever locate the bus and identify it as the bus which was involved in this accident?

A. No, sir.

Q. Did you make an effort to do so?

A. Yes, sir.

(Testimony of Edward J. Kail.)

Q. Why were you unable to locate the bus; can you tell us in a general way?

A. Yes, sir. In conducting my investigation in the case, the only way that I could possibly locate the bus would be through the number of the vehicle. The only possible place where the number of the vehicle could be would be on the trip ticket. That would be the only possible way of absolutely identifying the bus, would be through the trip ticket. I was unable to locate the trip ticket and therefore I couldn't make a positive investigation of the bus.

Q. Have you been the special agent who has handled the investigation connected with this case for the District Attorney's office connected with this investigation?

A. Yes, sir. [243]

Q. And all efforts through your office to locate this bus and the driver were by you?

A. Yes, sir.

Q. And the particular bus on which this accident occurred has not been identified by you?

A. No, sir.

* * *

Mr. Evans: The Defendant rests.

The Court: Any rebuttal?

Mr. Pennington: I would like to call Mrs. Bruck to the stand, please. [244]

Plaintiff's Rebuttal Evidence

MRS. W. C. BRUCK

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

By Mr. Pennington:

Q. Mrs. Bruck, would you state how many trips this truck made from Fort Lewis, Washington, accompanied by you preceding the 20th day of February, 1946, for a period of, say, a month?

A. It is my recollection that we went every week from about the last week in January for a period of four or five weeks.

Q. On any of these trips were you involved in an incident similar in nature to the one which is the subject matter of this action? A. Yes.

Q. Will you state to the Court just exactly what it was and what happened? [245]

* * *

A. Several weeks before the accident in which Mrs. Westfall was involved we were going from Seattle to Fort Lewis on one of these trips. It was my habit, at the time, to sit in the center of the back seat so that I was facing down the aisle of the bus. I don't know why but that was where I usually sat. On this particular occasion the bus driver was forced to stop by some car turning in front of him and it threw from the back seat down the aisle of the bus. I fell over an accordion and some suitcases in the aisle and landed toward the front of the bus.

(Testimony of Mrs. W. C. Bruck.)

The driver was very concerned about it and asked me about it. However, I didn't feel that I was hurt to any extent. He had pulled off the road, and asked me then and asked me several times between that point and Fort Lewis about the injury and was also very concerned on the way back. I didn't think much about it because I didn't feel that I had been hurt, and that it was not the bus driver's fault in the first place; it was purely an accident. So we left it at that.

Q. (By Mr. Pennington): Where did this incident occur, Mrs. Bruck?

A. My recollection is that it was someplace between South [246] Tacoma and Fort Lewis; I am not sure exactly.

Q. When you fell, did you fall all of the way to the floor? A. No, I didn't.

Q. Will you describe that in a little more detail, please?

A. Well, I started down the aisle running. I feel I would have gone through the windshield if I hadn't fallen over these suitcases. As it was, I landed apparently with this thumb hitting the back of a seat and with one knee to the floor. I didn't go all of the way to the floor. The only injury that I suffered was to my thumb, and I was badly shaken up.

The Court: Do you remember who the driver of the truck was?

The Witness: It is my impression that it was this man who is here because he had a definite

(Testimony of Mrs. W. C. Bruck.)

southern accent and was very polite and nice to me. I feel sure it is this driver here.

The Court: Could you tell me this: Was it the same driver that drove the night that Mrs. Westfall was injured?

The Witness: No, it wasn't. The driver on the night that Mrs. Westfall was injured was very gruff and not at all polite to any of us. [247]

* * *

Q. Do you have a definite recollection as to the bus which was involved in the accident of February 20, 1946?

A. Yes, I do, because I went forward to help Mrs. Westfall up and was able to step in behind the driver's seat in order to get her on the seat, and I couldn't have done that if there had been a railing there.

Q. Was there a vertical or horizontal rail in front of the seat occupied by her?

A. No, there wasn't.

Q. Was it an old or a new bus?

A. To my recollection it was an old bus. We often had old buses that were minus seats and various pieces of equipment.

Q. The time elements involved in this accident of February 20, 1946, as brought out in testimony here, were they in any way similar to the ones involved on the evening when you were thrown from your seat?

A. Yes, they were. They picked us up in West Seattle as a rule.

(Testimony of Mrs. W. C. Bruck.)

Q. And the same troupe was along on this bus that evening? [248] A. That is right.

The Court: The same, or were there others?

The Witness: There might have been. We made probably 75 trips to Fort Lewis altogether.

Q. (By Mr. Pennington): Do you know the person who played the accordion in this troupe?

A. Yes, I do.

Q. Did they play sheet music?

A. No, they didn't use sheet music. They played from memory.

Q. They played from memory entirely?

A. Yes.

Q. There would have been no occasion for any member in this troupe, then, seeking sheet music for the accordion player?

A. Not for the accordion player, no. As a rule, we carried our music in the suitcases. We didn't carry it out. [249]

* * *

Cross-Examination

By Mr. Evans:

* * *

Q. How much did you weigh at the time of this incident you are speaking of?

A. I suppose around 185.

Q. How much do you weigh now?

A. 155. [250]

* * *

MRS. E. T. HOLLOWAY

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Pennington:

Q. You have heard the testimony of Mrs. Bruck with respect to an incident happening prior to the one in which Mrs. Westfall was injured; do you recall that? A. Yes. [253]

Q. Were you on the bus on the trip at that time?

A. I was on the bus on the trip at that time.

Q. Will you explain to the Court just what happened?

A. Mrs. Bruck was sitting on a seat that goes clear across the back end of the bus. She was sitting in the center.

The Court: Where were you sitting?

The Witness: Probably on the left-hand side. I usually sat there, about halfway back. But I do remember the bus stopping very suddenly because a car went in front of it. She naturally was jolted off of her seat. But she didn't fall. She just stumbled down the aisle; and this accordion stopped her. I do remember the driver being very concerned about her and helping her off the bus.

The Court: You say the bus stopped?

The Witness: Yes.

* * *

Q. (By Mr. Pennington): Mrs. Holloway, do

(Testimony of Mrs. E. T. Holloway.)

you have a definite recollection of the bus on which you were riding on the evening of February 20, 1946, the evening on which Mrs. Westfall was thrown from the [254] seat?

A. Nothing, only that it was definitely old.

Q. It definitely was an old bus? A. Yes.

* * *

Q. Will you estimate the speed at which it was traveling just prior to the time of the accident?

A. On February 20, do you mean?

Q. The one on which Mrs. Westfall was hurt.

A. Well, I should say between 45 and 50 miles an hour. [255]

* * *

BARBARA WESTFALL

recalled as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Pennington:

Q. Miss Westfall, you have heard the testimony here with reference to the incident in which Mrs. Westfall was [256] thrown from her seat on an Army bus while it was on the way to Fort Lewis?

A. Yes.

Q. Do you recall that incident?

(Testimony of Barbara Westfall.)

A. Yes, I do.

Q. Will you relate what happened, please?

A. Yes. We were driving along and Mrs. Bruck was sitting in the middle of the back seat and the driver was forced by another car to stop suddenly, and Mrs. Bruck ran down the aisle and fell over some suitcases and caught herself on the back of the seat. The driver was very nice. As soon as he could he pulled off to the side of the road and wanted to know if she was hurt and wanted to know if he could take her to the hospital or anything. She said no. When we got to Fort Lewis he asked her again if she wanted to go to the hospital and he was very nice all of the way. Mrs. Bruck didn't think she was hurt. She was just surprised and shocked.

Q. Do you have a definite recollection of the bus on which you were riding on the evening that Mrs. Westfall, your mother, was thrown from the seat?

A. Well, I know it was an old bus. [257]

* * *

Q. What is your recollection of the speed at which it was traveling at or just prior to the time the accident occurred?

A. On the 20th?

Q. Yes.

A. I would say he was doing 50 miles.

* * *

Q. On the other incident in which Mrs. Bruck was involved, do you have any recollection as to where that occurred?

A. Well, not exactly.

(Testimony of Barbara Westfall.)

Q. Well, about where; could you give us an idea?

A. I would say after we left South Tacoma.

Q. Where did the incident involving Mrs. Westfall occur?

A. It was before we got to South Tacoma.

* * *

Q. Do you recognize Mr. Yingling?

A. I think he was the driver when Mrs. Bruck was thrown from her seat when she went down the aisle. I know [258] he wasn't the other man.

Q. You know he was not the driver involved on the evening your mother was injured?

A. I am very sure of that, yes. [259]

* * *

ESTHER WESTFALL

recalled as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Pennington:

Q. You have heard the incident related here involving Mrs. Bruck? [262]

A. Yes.

Q. Were you along on that evening, yourself?

A. Yes. The troupe didn't go out without me.

* * *

Q. Did it occur substantially as related by the previous witnesses?

A. Yes, it did. And the accident happened like

(Testimony of Esther Westfall.)

the bus driver stated. This car pulled in, in front of him, and he had to slam on his brakes to stop.

* * *

Q. (By Mr. Pennington): Do you recall where this incident occurred—at what point on the highway?

A. It was south of South Tacoma as you go on to Fort Lewis. [263]

* * *

Q. (By Mr. Pennington): Do you recognize this driver?

A. I am confident he was the driver of the bus the night Mrs. Bruck was thrown from her seat because he was so [265] concerned about it. He asked several times if she didn't want to go to the hospital and see a doctor or something or other. He was a gentleman all the way through.

Mr. Pennington: That concludes Plaintiff's rebuttal, your Honor.

The Court: Do you have anything else?

Mr. Evans: Nothing further.

(Both sides rest.)

The Court: I am persuaded that the plaintiff has made out a case. The Court will find negligence on the part of the driver of the bus proximately causing injuries to the plaintiff and that the plaintiff, herself, was free of contributory negligence. It is the duty and the very hard duty of the Court to determine the extent of her injuries. It is particularly difficult because of the quite sharp conflict

in the testimony of these doctors. For that phase of the case I will consider and announce my conclusion later.

I want to ask counsel under what theory he hopes to recover for the special damages consisting of bills of doctors which are not paid by nor [266] chargeable to the plaintiff.

Mr. Pennington: If your Honor please, the particular item in that category is a \$114 item of the Security Medical Clinic.

I think some unnecessary confusion was injected into the case with reference to that. It was not an insurance policy and no insurance company was involved. She took the policy with the clinic and, in return, received certain medical services. It was merely a pre-payment for medical services at \$3 a month. Actually she made those payments over a period of years and was making them at the time she was receiving this treatment. So that bill plus considerable in addition to it was actually paid to the clinic to give her a coverage of medical treatment. Because that pre-payment was made, there was no actual cash transaction in the amount of \$114. We put that bill in because that was the statement submitted to us by her doctor. [267]

* * *

The Court: She did definitely say she continued the payments up to 1947.

Mr. Pennington: 1947, yes.

The Court: What is your recollection on that, Mr. Evans?

Mr. Evans: My recollection there is that for

some period of time she paid the \$3. However, I would like to call the Court's attention to the case of Aetna Insurance Company vs. United States, found in Volume 338 of United States Supreme Court Decisions. I believe the page is 663, although I am not certain of the page—where the Supreme Court has held that the real party in interest is the only one that has a right to bring an action and with regard to subrogation there is no right of recovery. I don't believe there is any right of recovery for insurance premiums.

The Court: I am familiar with the case that you have in mind, Mr. Evans, but isn't this lady the real party in interest if she was paying something which entitled her to this medical service? [269]

* * *

Mr. Evans: Do I understand the Court does not [271] intend to hear from counsel as to the law and the facts and the contentions of the parties in regard to this case?

The Court: Well, you have no misgivings that this is sufficient evidence if I take the evidence most strongly in favor of the plaintiff that there was negligence on the part of the driver, do you? You don't make any such contention as that?

Mr. Evans: That is a fact to be determined. But as I understand, the Court is from a foreign state and we have some laws in the state which I think will have a very material bearing upon the right to recover.

The Court: What is it you have in mind?

Mr. Evans: I have in mind particularly our

guest statute in this state and the decisions decided thereunder. I think under the decisions in the state as to what is a host-guest relationship very clearly it may be shown in this case to have existed here which bars any right of recovery whatever.

The Court: When the Army was transporting this lady down there for the purpose of rendering services for the Army, you would say she was a guest of the Army?

Mr. Evans: Under the guest statutes of [272] this state—not only guests, but licensees. Further, I would like to call the Court's attention to a case cited on December 4, 1950, by the United States Supreme Court which is a consolidation of three cases, the first of which being *Feres vs. the United States*, wherein the type of liability similar to the one here was the subject at issue.

The Court: Similar. What are the facts?

Mr. Evans: That involved three cases where the relationship of servicemen to the Army was involved. The Supreme Court goes quite at length in that case to explain that the Tort Claims Act does not create a new type of liability.

The Court: Well, no, I can see of course under that statute if a private individual wouldn't be liable under these facts then the Government of course wouldn't be liable. But it seems to me, when you come to the guest statute, and you have a situation such as this where in consideration of transportation to the Camp Lewis that these ladies and these children were going to put on a show for the soldiers, that wouldn't be within the guest statute.

Mr. Evans: The decisions of our Supreme Court here I think will clearly show that under the evidence that has been put in, in this case, and I have watched [273] it very carefully, that no other relationship exists other than host-guest.

The Court: Let me have those decisions you have in mind.

Mr. Evans: I would like to call the Court's attention to a case in 194 Washington at page 86.

The Federal case to which I am referring is *Feres vs. the United States*, decided on December 4th by the Supreme Court of the United States.

The guest statute is 663-121 of our Remington's Revised Statutes of the State of Washington.

The 194 case is entitled *Syverson vs. Berg*. Also 117 Washington 537; that is 117 Washington 2nd 537. Also 30 Washington 2nd 814; and 9 Washington 2nd 77. Those are three of the outstanding cases upon which I rely. There are others.

The Court: Are you prepared here to tell me what the facts were in those cases and how you can draw a similarity between those cases and the one at the bar?

Mr. Evans: I would have to bring the volumes down. I would want to read to the Court the quotations from the cases where they describe what a host-guest relationship is. I thought if we were going to have an argument I would have had a moment to go upstairs [274] and get them.

* * *

The Court: Suppose I give you five days to prepare a short memorandum, Mr. Evans, and then

give Mr. Pennington five days to reply.

Court Reporter's Certificate

I hereby certify that as official court reporter for the United States District Court for the Western District of Washington, Northern Division, during the trial of Esther Westfall vs. United States of America, Civil action No. 2529, I stenographically recorded the testimony of all of the witnesses, together with all objections and exceptions of counsel, and the rulings of the Court thereon, and that the foregoing transcript consisting of 275 pages is a full, true and correct record of said proceedings at trial.

Dated this 1st day of June, 1951, in Seattle, Washington.

/s/ MERRITT G. DYER,
Court Reporter.

[Endorsed]: Filed June 5, 1951. [276]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, together with Defendant Exhibits A to O, inclusive, constitute the record on appeal from the final judgment filed and entered Feb. 2, 1951, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed Apr. 21, 1950.
2. Praecipe for process, filed Apr. 21, 1950.
3. Marshal's Return on Summons, filed Apr. 24, 1950.
4. Appearance of defendant, filed June 19, 1950.
5. Answer of defendant, filed Sept. 28, 1950.
6. Motion deft. for Order Directing Subpoena (Yingling), filed Dec. 19, 1950.
7. Order for subpoena of Witness Yingling and payment of fees, filed Dec. 19, 1950.
8. Praecipe for subpoena, Yingling, filed Dec. 19, 1950.
9. Pre-Trial Oral Examination of Esther Westfall, filed Dec. 26, 1950.
10. Praecipe for subpoena (Bruck), filed Dec. 27, 1950.
11. Marshal's return on subpoena (Yingling), filed Jan. 2, 1951.
12. Praecipe for subpoenas, Barton et al., filed Jan. 2, 1951.
13. Marshal's Return on subpoena (Bruck), filed Jan. 4, 1951.

14. Marshal's Return on subpoena, Barton, filed Jan. 4, 1951.
15. Marshal's Return on subpoena, Deasy, filed Jan. 4, 1951.
16. Marshal's Return on subpoena, Wayman, filed Jan. 4, 1951.
17. Praeceptum for subpoena, Hoebee, et al., filed Jan. 8, 1951.
18. Praeceptum for subpoena, DeLong, filed Jan. 8, 1951.
19. Marshal's Return on subpoena, Hoebee, filed Jan. 8, 1951.
20. Praeceptum for cert. copy of Order for Subpoena of witness and payment of fees, filed Jan 8, 1951.
21. Marshal's Return on subpoena, Speeres, filed Jan. 9, 1951.
22. Memorandum of Authorities by defendant, filed Jan. 16, 1951.
23. Memorandum Brief of Authorities, filed Jan. 22, 1951.
24. Memorandum opinion of Judge Lemmon, filed Jan. 25, 1951.
25. Supplemental Memorandum of Judge Lemmon, filed Jan. 30, 1951.
26. Findings of Fact and Conclusions of Law, filed Feb. 2, 1951.
27. Judgment for Plaintiff, filed Feb. 2, 1951.
28. Amendment to Memorandum by Judge Lemmon, filed Feb. 5, 1951.
29. Memorandum of Costs and Disbursements, filed Feb. 6, 1951.

30. Motion of deft. to set Aside Court's Decision and Enter Judgment in Favor of Defendant or in the Alternative Granting a New Trial, filed Feb. 9, 1951.

31. Memorandum of Costs and Disbursements, Amended, filed Feb. 12, 1951.

32. Opening Memorandum of Authorities in Support of Motion for New Trial, filed Feb. 27, 1951.

33. Memorandum of Authorities in Opposition to Defendant's Motion to Set Aside the Court's Decision and Enter Judgment in Favor of the Defendant, or, in the Alternative to Grant a New Trial, filed Mar. 9, 1951.

34. Reply Memorandum of defendant, filed Mar. 13, 1951.

35. Order denying Motion for New Trial, filed Mar. 22, 1951.

36. Notice of Appeal of defendant, filed Mar. 23, 1951.

37. Marshal's Return on subpoena, DeLong, filed Mar. 27, 1951.

38. Motion, defendant, to Extend Time for Docketing Record on Appeal, filed Apr. 13, 1951.

39. Note for Motion Docket, on above motion, filed Apr. 13, 1951.

40. Order Extending Time for Docketing Record on Appeal, filed Apr. 17, 1951.

41. Transcript of Proceedings at Trial, Volume I, filed June 5, 1951.

42. Transcript of Proceedings at Trial, Volume II, filed June 5, 1951.

43. Order transmitting original exhibits, filed June 7, 1951.

I certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of defendant, to wit:

Notice of Appeal.....\$5.00,

and that this amount has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 7th day of June, 1951.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12966. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Esther Westfall, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 9, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit

No. 12966

UNITED STATES OF AMERICA,

Appellant,

vs.

ESTHER WESTFALL,

Appellee.

POINTS TO BE RELIED UPON ON APPEAL

Comes now the appellant, United States of America and states that the following points will be relied upon on appeal in the above-entitled cause:

1. The Court erred in failing to dismiss the appellee's complaint for the reason that the same was barred by the statute of limitations of the State of Washington.

2. The Court erred in failing to find that the appellee's cause of action is barred because of laches on the part of the appellee.

3. The Court erred in failing to apply the guest statute of the State of Washington, Section 6360-121, Remington's Revised Statutes of Washington, which denied the appellee the right to recover.

4. The Court erred in allowing the plaintiff \$250.00 as special damages for the reason that there was no proof of such special damages.

5. The Court erred in allowing appellee to re-

cover as a part of her special damages, the doctor bill of Dr. Seering when the same was covered by an insurance policy which carried the right of subrogation to the insurer.

6. The Court erred in allowing appellee to recover as a part of her special damages for the services rendered by doctors who examined appellee solely for the purpose of testifying at the trial.

7. The Court erred in allowing the appellee to recover as special damages for various and sundry drugs and bandages when there was no proof of such damages.

8. The general damages in the sum of \$7,500.00 allowed by the Court were excessive in view of the injuries alleged to have been suffered by the appellee.

9. The Court erred in finding that the Government's bus driver was negligent.

10. The Court erred in failing to find that the appellee was guilty of contributory negligence.

11. The Court erred and abused its discretion in failing to grant the appellant a new trial because of accident and surprise which occurred during the trial and which ordinary prudence could not have guarded against.

12. The Court erred in failing and refusing to allow counsel to argue the facts of the case at the conclusion of the evidence.

13. The Court erred in failing to require ap-

pellee to prove her case by a preponderance of the evidence and in finding in favor of the appellee upon taking her testimony in its most favorable light.

14. The Court erred in refusing to allow Mrs. Deasy and Mr. Barton to testify with regard to reports they had submitted dealing with the appellee's physical condition at a time when their knowledge of her condition was very fresh in their memories.

15. The Court erred in granting judgment in favor of the appellee.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1951.

[Title of Court of Appeals and Cause.]

APPLICATION FOR LEAVE TO HAVE EXHIBITS CONSIDERED IN ORIGINAL FORM AND NOT PRINTED AS A PART OF THE RECORD

Comes now the appellant, United States of America, and makes application for leave of the Court to have the following exhibits considered in their

original form but not printed as a part of the printed record:

Exhibit A—Picture of interior of a bus.

Exhibit B—Picture of interior of a bus.

Exhibit C—Picture of interior of a bus.

Exhibit E—Photostat of application for employment.

Exhibits G through L—X-rays.

Exhibit N—Army Field Manual.

Exhibit O—An Army Regulation.

This application is based upon the affidavit of Vaughn E. Evans attached hereto.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Of Counsel.

State of Washington,
County of King—ss.

Vaughn E. Evans, being first duly sworn, upon oath deposes and says:

That he was the Assistant United States Attorney who tried this action and that he is familiar with the exhibits on file with the Clerk of this Court; that in his opinion the exhibits set forth in the foregoing application can be adequately considered by the Court in their original form and that the cost of reproducing the same as part of the printed record would be out of proportion to the benefit which might be derived therefrom;

That Exhibits A, B, and C are pictures which

would require the preparation of a cut; that Exhibit E is a photostat of a document for which a cut would have to be prepared in order to print the same; that Exhibits G through L are X-rays which your affiant understands can only be properly examined in their original form; that Exhibit N is an Army Field Manual containing well over a hundred pages, only a few pages of which are relevant in this action; that Exhibit O is a pamphlet containing a portion of the Army Regulations, only one or two paragraphs of which are relevant in this appeal.

/s/ VAUGHN E. EVANS.

Subscribed and sworn to before me this 6th day of June, 1951.

[Seal] /s/ KENNETH J. SELANDER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 12, 1951.

[Title of Court of Appeals and Cause.]

ORDER RE EXHIBITS

This matter having come on on application of the appellant for permission to have the Court consider Exhibits A, B, C, E, G through L, N, and O in their original form and further that such exhibits not be printed as a part of the record and the

Court being fully advised in the premises, it is hereby

Ordered that Exhibits A, B, C, E, G through L, N, and O be considered in their original form and not printed as a part of the record in this appeal.

Done this 11th day of June, 1951.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

Judges, United States Court of Appeals for the
Ninth Circuit.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 12, 1951.

No. 12966

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ESTHER WESTFALL,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

No. 12966

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VAUGHN E. EVANS
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1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ESTHER WESTFALL,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF APPELLANT

JURISDICTION

This action was brought by the Appellee pursuant to the Federal Tort Claims Act (Section 1346, Title 28, U.S.C., and Chapter 171 of Title 28, U.S.C.). The jurisdiction of this Court to review the decision of the district court is set out in Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

The Appellee seeks to recover for an alleged injury sustained while a passenger on a bus operated by the United States Army.

On February 20, 1946, the Army authorities at Fort Lewis, Washington, sent a bus to Seattle, Washington, for the purpose of transporting some USO entertainers to Fort Lewis. The entertainment group consisted of young boys and girls between the ages of eleven and eighteen years who performed various dancing and musical acts. The Appellee was the mother of two of the girls and accompanied the entertainers as a chaperon (Tr. 54, 66, 69). The entertainers performed the services voluntarily, and there was no compensation to be paid to the entertainers. They performed their services for their own pleasure only (Tr. 53, 55, 64).

There were approximately 15 to 20 persons in the entertainment group and the bus would accommodate 25 to 30 people. The Appellee was riding on the seat immediately in the rear of the driver's seat. This seat was built to accommodate two individuals. The left side of the seat was next to the left wall of the bus while the right side of the seat was on the aisle. The driver's seat was approximately one foot in front of the right half of this double seat. In front

of the left half of the seat there was an empty space approximately 1 to 1½ feet wide and about 2 feet long running forward to the dashboard and front of the interior of the bus (Tr. 60, 61).

The evidence is in sharp dispute as to where the Appellee was seated. The Appellee weighed 256 pounds and claims that she was sitting on the left hand side of the seat facing towards the front (Tr. 35, 60).

The Appellant's evidence showed that there was a hand rail just forward of the seat upon which the Appellee was riding extending from the left hand wall of the bus towards the center of the bus, at about the height of the back of the seats, and that this hand rail connected with a vertical rail in about the middle of the bus (Tr. 108, 153). The Appellant's evidence further showed that the Appellee was seated on the right hand portion of the double seat immediately behind the driver with her back towards the left hand side of the bus and her feet towards the aisle (Tr. 109, 112, 134, 135, 141).

The evidence further showed that there was no arm rest at that portion of the double seat which was next to the aisle (Tr. 35).

The evidence is likewise in sharp dispute as to

the manner in which the alleged injuries occurred. The Appellee contends that the Appellant's driver approached a traffic signal at a speed of approximately 60 miles per hour, and that when the bus was approximately 50 feet from the traffic signal the same turned red and the driver applied the brakes, coming to a complete stop (Tr. 36). The Appellee claims that she was thrown to the floor of the bus into the vacant space between the driver's seat and the outside wall of the bus. The Appellee further claims that the incident took place within the city limits of the city of Tacoma (Tr. 35, 36).

The Appellant's evidence shows that the particular bus being used in this occasion was a new International K-7 (Tr. 103, 104, 119). This bus was equipped with a governor which would cut off the fuel supply when the bus reached a speed of 35 miles per hour (Tr. 106, 116, 117, 146 and Exhibit "N"). The governor was a sealed unit which could not be tampered with or altered without breaking the seal (Tr. 147). The driver inspected the bus prior to the commencement of the trip and found the governor to be intact and the seal unbroken (Tr. 104). Army regulations prescribe that the governor on such a vehicle be set for 35 miles per hour (Tr. 149 and Exhibit "O"). The maximum speed which the bus could attain without a governor was 45 to 48 miles (Tr. 151).

The Appellant's evidence further showed that the highway between Tacoma and Seattle is a 4-lane highway for the entire distance. Just south of the city of Tacoma the Appellant's driver moved to the left hand or center of the lane for south-bound traffic in order to pass a tractor which was stopped in the right hand lane (Tr. 110, 111). Before the driver could maneuver the bus back in the right hand lane, other traffic began passing the bus on the right hand side. As the driver was attempting to find an opening where he could move to the right hand lane, a vehicle coming from a side road from the driver's left, darted out across the northbound traffic lanes and made a left turn immediately in front of the bus heading south. At this time the bus driver was driving at approximately 20 to 25 miles per hour (Tr. 111, 137). The Appellant's driver applied his brakes to avoid a collision with this vehicle (Tr. 115). The bus did not come to a complete stop but only decelerated so as to avoid a collision with the other vehicle (Tr. 112, 123). The bus driver was aware that the Appellee was on the floor of the bus behind him, but before he could pull the bus off the highway and stop, she had gotten back onto her seat (Tr. 112, 113, 116). The Appellee did not fall all the way to the floor but maybe on one knee (Tr. 122). By the Ap-

appellee's own admission she could not see the ~~speed~~^{speed} of the bus (Tr. 47).

The evidence is likewise in sharp dispute as to the Appellee's injuries. The Appellee contends she was 41 years of age at the time of the alleged injuries and that she twisted her back in the fall and that her full weight was thrown on her left ankle as the result of which she had a severe sprain of her left ankle and her back. The ~~Appellant~~^{Appellee} contends that her ankle and back have bothered her ever since the accident (Tr. 36). The Appellee admits that she was employed as a school teacher at the time of the accident and that on the next day, Thursday, February 21st, she went to work and worked the full day. February 22nd was a Friday and a holiday. The Appellee returned to work on Monday, February 25th, and worked the remainder of that week (Tr 48). After work, on February 21, 1946, the Appellee went to Dr. Seering for an examination. X-rays were taken and it was found that no bones were broken (Tr. 37, 73, 74, 81).

The evidence showed that when the Appellee went to Dr. Seering on February 21, 1946, that she did not complain of any back injury, but only complained of a sore ankle (Tr. 80, 81, and Exhibit "D"). The evidence further showed that women who

weigh in excess of 250 pounds frequently have sore backs and sore ankles (Tr. 82).

On March 8, 1949, the Appellee was examined by Dr. Lindahl, a doctor of her own choosing. Dr. Lindahl found both ankles swollen, but found that she had a normal back (Tr. 84, 85).

On December 11, 1950, the Appellee was examined by Dr. Sprecher, another doctor of the Appellee's own choosing, who found a very minimal amount of muscle spasms in the back, but no swelling in her ankle (Tr. 88, 89).

On October 3, 1950, Appellee was examined by Dr. McConville at the Appellant's request. Dr. McConville found no evidence of muscle spasms in the back, but on the contrary, found the Appellee could use her back within normal limits. The Appellee's ankles measured eleven inches equally (Tr. 127, 128, 129). Dr. McConville attributes the Appellee's pains in her back to poor posture (Tr. 127, 128).

At the time of the trial the Appellee weighed 175 pounds and X-rays taken by Dr. McConville showed no old or recent injuries in the ankles (Tr. 130).

The Appellant's evidence likewise showed that the superintendent of the school at which the Appellee was teaching on February 21, 25, 26, 27, 28 and

March 1, 1946, was not aware of the Appellee's having received any injury and did not notice any limp or other signs of physical pain or injury (Tr. 93).

The superintendent of the school at which the Appellee taught between November 1, 1948 and June of 1949, did not notice any limping by the Appellee or any other manifestations of any physical disability (Tr. 95).

Further, in June, 1949, the Appellee made written application for a job as a school teacher with the Seattle Public Schools in which she stated that she had no physical disability (Tr. 97, 98, and Exhibit "E").

The extent of the Appellee's loss of earnings is likewise in sharp dispute. The Appellee contends that her income has been lowered by reason of her injuries (Tr. 51). During the school year, 1945-1946 the Appellee earned \$800.50 (Tr. 100, 101). However, by the Appellee's own testimony, it was shown that she went to work at the Boeing Airplane Company as a key-punch operator in the fall of 1946 and worked until the latter part of 1947, during which time she worked eight hours a day and earned \$40 to \$45 per week, at an hourly rate of \$1.10 per hour (Tr. 39, 49). The Appellee further admitted that after working at Boeings she went to work selling

Stanley Home products, which job she retained until sometime in the latter part of 1948 (Tr. 40, 50). Stanley Home products are cleaning and preserving materials for household use. The Appellee's job consisted in making demonstrations of such products as floor wax, furniture polish, etc. At this job the Appellee earned \$150 per month. Appellee further admitted that she obtained a job as a school teacher beginning November 1, 1948, and continued in that employment until June of 1949, earning \$212 per month (Tr. 41). After this teaching job the Appellee went to school for four weeks and received a B.A. degree (Tr. 43). Thereafter the Appellee worked as a saleswoman for Real Silk Hosiery, earning approximately \$150 per month. This job consisted of making house to house canvasses (Tr. 53).

The evidence as to the special damages was as follows:

The Appellee had a health policy with the Medical Security Clinic for which she paid a monthly premium of \$3.00. Dr. Seering's bill was \$114, but the same was paid by the Medical Security Clinic (Tr. 45). Appellee's policy contained a subrogation agreement whereby the Medical Security Clinic had the right to recover against third parties for the medical expenses arising out of any injury where a

third party would be liable for the same (Tr. 76, 77, 78).

Dr. Sprecher testified that the costs of his services were \$15.00, but that the sole purpose in his examining the Appellee was for the purpose of testifying at the trial (Tr. 91).

Dr. Lindahl testified that the cost of his services was \$20.00, but that he, too, examined the Appellee solely for the purpose of testifying at the trial (Tr. 87).

The Appellee testified that she expended approximately \$150 for alcohol, aspirin and alka-seltzer because of her injuries (Tr. 44).

Upon this testimony the trial judge allowed recovery of \$250.00 for special damages.

At the conclusion of the evidence the trial court announced its decision without allowing counsel for either side to make any argument whatever (Tr. 165). In finding liability on behalf of Appellant, the trial court took the evidence most strongly in favor of the Appellee without requiring that the Appellee prove her case by a preponderance of the evidence (Tr. 167).

QUESTIONS RAISED

1. Does the Appellee have a right to sue the United States of America in the State of Washington, bringing her action over four years after the action arose when the statute of limitations for such an action in the State of Washington is three years?

2. Is the Appellee's action barred because of laches?

3. Is the Appellee barred from recovery because of the guest statute of the State of Washington?

4. Is the Appellee's evidence sufficient to allow recovery of the \$250.00 as special damages?

5. Is the Appellee entitled to recover for the services of Dr. Seering when she did not pay for such services but when the same were paid for by her insurance company?

6. Is the Appellee entitled to recover for the services of doctors who examined her solely for the purpose of testifying at the trial?

7. Is the Appellee's testimony that she spent \$150.00 for drugs sufficient for the recovery of said amount?

8. Are the Appellee's injuries sufficient to sus-

tain an award of general damages in the sum of \$7500.00?

9. Was the Appellant's driver guilty of negligence?

10. Was the Appellee guilty of contributory negligence?

11. Does a litigant have a right to argue his case before the court's decision is rendered?

12. Is a plaintiff required to prove his case by a preponderance of the evidence?

13. May reports rendered by a witness in the regular course of business be submitted in evidence?

SPECIFICATIONS OF ERROR

1. The Court erred in failing to dismiss Appellee's complaint for the reason that the same was barred by the Statute of Limitations of the State of Washington.

2. The Court erred in failing to find that the Appellee's cause of action was barred because of laches.

3. The Court erred in failing to apply the Guest Statute of the State of Washington which denies the Appellee the right to recover.

4. The court erred in allowing the Appellee \$250.00 as special damages.

5. The general damages in the sum of \$7500 allowed by the Court were excessive in view of the injuries alleged to have been received by the Appellee.

6. The evidence is insufficient for the Court to find the Appellant's driver guilty of negligence.

7. The Court erred in failing to find that the Appellee was guilty of contributory negligence.

8. The Court erred and abused its discretion in failing and refusing to allow counsel to argue the facts of the case to the conclusion of the evidence.

9. The Court erred in failing to require the Appellee to prove her case by a preponderance of the evidence and in taking the Appellee's evidence in its most favorable light.

10. The Court erred in refusing to allow Mr. Barton to testify as to reports he had made and submitted dealing with Appellee's physical condition at a time when his knowledge of such condition was fresh in his memory.

ARGUMENT ON SPECIFICATION OF ERROR NO. I
SUMMARY

The Federal Tort Claims Act allows recovery only in such cases where the laws of the state in which the act or omission occur would allow recovery. The Statute of Limitations in the State of Washington is three years for the type of action brought by the Appellee, a private person in the State of Washington would not be liable to the Appellee in this case.

ARGUMENT

The Appellee claims she was injured on February 20, 1946. The Appellee commenced this action April 21, 1950, or four years and two months after the cause of action arose.

Section 1346 of Title 28, U. S. Code provides that the United States shall be liable for torts in such cases "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occur." Section 155 of Remington's Revised Statutes for the State of Washington states in part as follows:

"Actions can only be commenced within the periods hereinafter prescribed after the cause of action shall have accrued, * * *."

Section 159 of Remington's Revised Statutes for

the State of Washington states in part as follows:

“Within three years: * * * 2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
* * *.”

If the United States of America were a private person in this instance the Appellee could not have commenced her action after February 20, 1949. The Appellee could not have commenced an action against the Appellant's driver, personally, after February 20, 1949. Since the United States can only be liable because it is the employer of the driver of the bus, the United States can not be liable if the driver of the bus is not liable.

Section 267 of Title 28, U. S. Code, states in part as follows:

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances
* * *.”

When Congress amended Section 2401 of Title 28, U. S. Code, in 1949, extending the statute of limitations for one year on tort claims, there was no indication that Congress ever intended to extend the liability of the United States beyond that of a private person under like or similar circumstances.

ARGUMENT ON SPECIFICATION OF ERROR NO. II
SUMMARY

The Appellee and her counsel knew of the cause of action and intended to bring the action at least as early as June of 1948. However, the action was not commenced until four days before the statute of limitations of the Federal Court expired on April 25, 1950. The Appellant has been seriously prejudiced by such unwarranted and unexplained delay.

ARGUMENT

The Appellee's action is further barred by reason of laches. If the state statute of limitations did not otherwise bar the Appellee from commencing her action, the Appellee could not have begun an action against the United States after April 25, 1950 (Sec. 2401, Title 28, U. S. Code). The action was commenced just four days before this date.

It is the Appellant's contention that where a party commences an action after the state statute of limitations has expired, the same is barred by the doctrine of laches even though the statute of limitations of the forum in which the action is brought does not so bar the commencement of the action. The Court of Appeals for the Ninth Circuit ruled squarely upon this point in *Westfall Larson & Company v. Allman-*

Hubble Tugboat Company, 73 F. (2d), 200. In that case an action was begun in admiralty after the three year statute of limitations prescribed by the laws of the State of Washington had expired. The same statute of limitations, that is, Section 159 of Remington's Revised Statutes, was involved in that case as here. The action was brought by a Washington corporation against a vessel whose owner resided in Norway and the amount involved exceeded \$3000. On the appeal two questions were raised: (1) Was the claim barred by virtue of the doctrine of laches and (2) was the tort a maritime tort within admiralty jurisdiction. The Court of Appeals for the Ninth Circuit ruled that the claimant could not recover because of the doctrine of laches, stating:

"The law is well settled in that, in the absence of a showing of such 'exceptional circumstances' a court of admiralty in determining the question of laches will be governed 'by analogy' by the state statute of limitations covering actions of the nature disclosed by the libel."

The Court also held that the tort was not within Admiralty jurisdiction. Had this latter point been the only objectional feature in the case, the Court of Appeals would undoubtedly have considered the matter as having been tried as a civil cause, since there was jurisdiction for the Federal Court to hear the matter as a civil cause. There was diversity of citi-

zenship and the amount in controversy was in excess of \$3000. However, since the Court of Appeals for the Ninth Circuit did not remand the Westfall Larson case to the district court to be considered as a civil cause, it is obvious that the doctrine of laches constitutes a valid defense in a civil action as well as in admiralty.

In the case of *Twin Harbor Stevedoring & Tug Company vs. Marshal*, 103 F. (2d), 513, and *Kobilkin v. Pillsbury*, 103 F. (2d), 667, the Court directed that since the action was started on the civil side rather than the admiralty side, that the district court should treat the petition as a libel and proceed with the action.

The doctrine of laches is considered an adequate defense by the courts of the State of Washington. In *Keyes v. Tacoma*, 12 Wash. (2d), 54, the Supreme Court of the State of Washington states as follows:

“In order to bar recovery because of laches, there must appear, in addition to the lapse of time, some circumstances from which the defendant or some other person, may be prejudiced; or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if recovery is allowed.”

The obvious purpose of both the statute of limitations and the doctrine of laches is to bar stale claims.

The doctrine of laches is based upon some injury or prejudice to the defending party by reason of the plaintiff having delayed so long in bringing the action. The evidence in this case clearly shows that the Appellant was prejudiced in preparing a defense to this action because of the Appellee's failure to bring the action until four years and two months after the action arose.

The evidence shows that even with the facilities of the Federal Bureau of Investigation the Appellant was unable to locate several of the witnesses to this action. The evidence further shows that the Government was unable to locate the trip tickets issued for this particular trip. Had the action been brought at a time when it should have been, the records would have probably been available to the Appellant. Also, had the action been commenced within a reasonable time, the Appellant would undoubtedly have had the benefit of fresher memories and probably been able to locate additional witnesses. In addition to these facts it should also be noted that the Appellee was aware of her right to bring an action and intended to bring such action as early as June 21, 1948. Exhibit "D" (Tr. 80) is a letter from the Appellee's physician to her attorney, bearing that date, wherein Dr. Seering sets out the results of his physical ex-

amination. Despite such knowledge of the existence of an action in 1948, the Appellee did not bring her action until two years later.

It should be further noted that at the time of the alleged injury the Appellee weighed 256 pounds. On March 8, 1949, when Dr. Lindahl examined the Appellee she still weighed 253 pounds. By the time the Appellee brought her action her weight had been reduced to approximately 175 pounds. Had the Appellee brought her action in 1948, the Appellant's physician could have made a far better diagnosis as to the cause of her injury, that is, whether her alleged pain and suffering were real and if so whether the cause was excessive weight or some other causes. By virtue of the Appellee's unwarranted and unexplained delay in bringing this action, the Appellant has been deprived of the right to examine the physical evidence.

It is a matter of common knowledge that during the year of 1946 the U. S. Army was in the process of demobilizing the several million men. This demobilization took place in a relatively short period of time. Once the personnel were demobilized, the task of tracing such witnesses who might have known something about this incident became difficult. The task of finding those individuals after four years became well nigh impossible.

From the undisputed evidence in this case, it is the Appellant's contention that the only logical conclusion that can be drawn is that the Appellee intentionally delayed bringing the action until it would be impossible for the Appellant to prepare a defense. The doctrine announced in the Westfall Larson case, *supra*, should be applied to this case, that is, that when the state statute of limitations bars an action in the state courts the doctrine of laches bars the same action when brought in the Federal courts.

ARGUMENT ON SPECIFICATION OF ERROR NO. III

SUMMARY

The Army authorities invited the group to come to Fort Lewis. The group accepted the invitation. There was no payment to be made of any kind by either the Army or the group. The group went on the trip for its own pleasure. No one was bound to go on the trip. This is a host-guest relationship for which the laws of the State of Washington bar recovery.

ARGUMENT

Guest Statute—Section 6360-121 of Remington's Revised Statutes of Washington states as follows:

"No person transported by the owner or operator of a motor vehicle as an *invited guest* or licensee,

without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death, or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator: Provided, That this section shall not relieve any owner or operator of a motor vehicle from liability while the same is being demonstrated to a prospective purchaser." (Italics supplied).

The Court's attention is particularly invited to the italics portion of the above statute which distinguishes this guest statute from most guest statutes in some other states.

In *Syverson v. Berg*, 194 Wash. 86, the defendant, a college boy, desired to take the plaintiff's daughter to a dance in another city where the daughter would have to stay over night. The plaintiff's mother at first refused to permit her daughter to make the trip but finally consented on the condition that she go along as a *chaperon*. The court held that the mother was a guest within the meaning of Section 6360-121 of the Washington statutes and could not recover against the defendant for an injury she sustained while riding in the defendant's automobile. The following quotation from the decision is pertinent to the issues in this case:

"This was a purely social automobile trip. *It was not taken in expectation of material gain.* To hold that a mother acting as a *chaperon* to her

daughter for the sake of propriety is not within the status of an invited guest — there is no evidence or claim of any monetary consideration either accruing or promised to the appellant as a result of this trip — would so misinterpret the statute as to divest it of force and defeat the clearly declared intention of the legislature to deny recovery, as against the owner or operator of the automobile, to a guest or licensee where no business advantage or material consideration accrued to the host in the transportation resulting in the injury.” (*Italics supplied*).

All of the testimony in the case at hand clearly shows that the Army extended an *invitation* to this group of children to come to Fort Lewis. All of the evidence shows that the reason the children went to Fort Lewis was for their own pleasure. Every witness interrogated on this subject testified that she enjoyed making the trips and got a great deal of pleasure out of them and further that they were under no obligation whatever to make any trip. There was no money or payment of any kind involved. Either before or after the entertainment, if time permitted, a party was provided where refreshments were served and a social gathering took place. The only possible relationship that is shown by the evidence is that of host-guest. As stated in the Syverson case, the trip was not taken in expectation of material gain nor was there any material benefit conferred upon the driver's master.

In *Taylor v. Taug*, 17 Wash. (2d) 533, the following quotation defining the host-guest relationship is of material assistance:

“The relationship of host and guest in its inception carries with it the concept of a *gratuitous offer of service by a host, or a request for service on the part of a guest and an acceptance, followed by an overt act*. While it cannot be held that the relationship is founded upon contract, still in its very nature it must be based upon a meeting of the minds of the host and the intended guest, followed by an act which manifests an intent to proceed with the journey.”

The above definition describes exactly what occurred in the case at hand.

It is anticipated that opposing counsel may argue that the relationship between the Government and the Appellee in this action is that of joint adventurers. In the case of *Finn v. Drtina*, 30 Wn. (2d) 814, at pages 825 and 826, the Supreme Court of the State of Washington defines joint-adventurers as follows:

“In each of the cases of *Hurley v. Spokane*, *Martin v. Puget Sound Electric R.*, and *Shirley v. American Automobile Ins. Co.*, *supra*, the action was not brought by one member of a joint enterprise against another member thereof, but was brought by one who, under the facts, was held to be a joint adventurer, against an independent third party. The three cases last referred to, together with many other prior cases, are cited and discussed in the case of *Carboneau*

v. Peterson, 1 Wn. (2d) 347, 95 P. (2d) 1043. The opinion states:

'The analysis of the foregoing twenty-seven cases leads to at least one irrefutable conclusion, namely, that the case of *Rosenstrom v. North Bend Stage Line*, *supra*, (154 Wash. 57, 280 Pac. 923) has pronounced, and is, the law in this state with respect to joint adventures wherein the use of automobiles is involved. Although, from what appears in the opinion in some of the cases, it may be difficult to demonstrate that the rule has at all times been consistently applied in its full extent and vigor, there can be no doubt of the prevalence and fixity of the rule itself. Its recurrent citation has made it a rubric upon this branch of the law.

'Briefly stated, a joint adventure arises out of, and must have its origin in, *a contract*, express or implied, in which the parties thereto agree to enter into an undertaking in the performance of which they have a common purpose and in the objects or purposes of which they have a community of interest, and, further, a contract in which each of the parties has an equal right to a voice in the manner of its performance and an equal right of control over the agencies used in the performance. Thus, we note (1) a contract, (2) a common purpose, (3) a community of interest, (4) equal right to a voice, accompanied by an equal right of control.

'The *sine qua non* of the relationship is a *contract*, whether it be express or implied. As a legal concept, a joint adventure is not a status *created or imposed by law*, but is a relationship voluntarily assumed and arising wholly *ex contractu*. The essence of a contract is that it binds the parties who enter into it and, when made, obligates them to perform it, and failure of any of them to perform constitutes, in law, a

breach of contract. A mere agreement, or concord of minds, to accompany one another upon an excursion, but without an intent to enter into mutually binding obligations, is not sufficient to create the relationship of joint adventure. (*Italics ours*).'

Whatever may be said in regard to the cases decided prior to the *Carboneau case*, *supra*, it is now firmly established that the rules announced in the *Carboneau case* are now the rules to be applied in determining whether or not in a given case the relationship of joint adventurer exists."

It will thus be seen from the above quotation that one of the essential elements of the relationship of joint adventurers is that there be a contract that binds the parties. The evidence in this case clearly shows there was no binding contract. The relationship between the Government and the Appellee was entirely voluntary, there being no compulsion on either party to carry out the program.

The case of *Justice v. Lavagetto*, 9 Wn. (2d) 77, might also be of interest to the Court in pointing out that even an employer-employee relationship has been considered a host-guest relationship under the Washington Decisions. On page 80 the court stated as follows:

"Respondent and the other two persons who were riding with Mr. Lewis in his truck were employed by Mr. Lewis, and boarded at his home. On the evening in question, Mr. Lewis was taking his three employees and boarders home, purely as

an accommodation to them, and we agree with the trial court that, at the time of the accident, respondent was a guest in Mr. Lewis' truck."

The Court's attention is also invited to the decisions rendered by the United States Supreme Court on December 4, 1950, the same being Nos. 29 and 31 of the October term, the first case being entitled *Feres v. United States*, 340 U.S. 135. These three cases were brought by members of the armed services against the United States for torts arising out of the negligence of military authorities. In the *Feres case*, the executor of the deceased soldier brought the action to recover for the wrongful death of the soldier caused by the negligence of his superior officers in quartering the soldiers in a barracks known to be unsafe because of a defective heating plant.

In the *Jefferson case* the plaintiff's action was based on the negligence of Army doctors in leaving a towel in his abdomen during an operation.

In the *Griggs case*, the action was based on wrongful death arising from the negligence of Army surgeons.

It will be noted that in all three of these cases, had the relationship of the plaintiff been that of employee-employer or doctor-patient, a cause of action would have existed. However, by virtue of the fact

that the plaintiffs in all three cases were members of the armed services at the time of the tort, the Supreme Court decided that there was no liability. The basis of this reasoning is that it was not the intention of Congress in passing the Federal Tort Claims Act to create any new type of tort. Further, that the tort claims act allows recovery only where a private individual would be liable. The Supreme Court stated as follows:

“One obvious shortcoming in these claims is that plaintiffs can point to no liability of a ‘private individual’ even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the government he is serving. Nor is there any liability ‘under like circumstances,’ for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command. The nearest parallel, even if we were to treat ‘private individual’ as including a state, would be the relationship between the states and their militia. But if we indulge plaintiffs the benefit of this comparison, claimants cite us, and we know of no state which has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state the contrary has been held to be the case. It is true that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability. In the usual civilian doctor and patient relationship,

there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. We find no parallel liability before and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

From this quotation it is obvious that the burden rests upon the Appellee to prove that the Government would be liable if it were a private individual, under the circumstances as shown by the evidence.

It is, therefore, the Appellee's burden to show to this court some case where the plaintiff would have a right of action where she is injured while chaperoning her daughter and other children on a trip which involved the purpose as set out in the evidence in this case. The defendant has made a search of the authorities and can find no case where such liability has ever existed. Unless the plaintiff can produce such authorities, no liability exists according to the decision in the *Feres case*.

ARGUMENT ON SPECIFICATION OF ERROR NO. IV

SUMMARY

The evidence adduced on special damages is wholly inadequate, the same consisting of doctor's services paid for by an insurance company, doctor's services who examined the Appellee solely for the purpose of testifying and estimates of the amounts spent by the Appellee for aspirin, alcohol and the like.

ARGUMENT

The trial court allowed the Appellee special damages in the sum of \$250. The evidence adduced at the trial as to special damages consisted of four items as follows:

1. Dr. Seering's services.....	\$114.00
2. Dr. Lindahl's services.....	20.00
3. Dr. Sprecher's services.....	15.00
4. Purchase of aspirin, alcohol and alka- seltzer by the Appellee estimated at..	150.00
	<hr/>
	\$299.00

It is the Appellant's contention that the evidence as to each of these items of expense is not sufficient to support a judgment for special damages.

The Appellee had a policy with the Medical Security Clinic upon which she paid a premium of \$3.00 per month. This policy entitled the Appellee to receive

medical services including the services of Dr. Seering (Tr. 77, 78). The Appellee did not actually pay for Dr. Seering's services. Under the terms of the Appellee's policy the Medical Security Clinic had the right to take recourse under a subrogation clause against any third party who might be liable for Appellee's injuries.

The Supreme Court of the United States in *United States v. Aetna Casualty Company*, 338 U.S., 366, ruled squarely upon this point in stating:

"If the subrogee has paid the entire loss suffered by the insured, it is the only real party in interest and must sue in its own name."

In this case the subrogee, the Medical Security Clinic, has paid for all of the services of Dr. Seering and therefore if a recovery is to be allowed for Dr. Seering's services the subrogee must be a party to the lawsuit. Since the subrogee is not a party to the lawsuit, the Appellee can not recover the \$114.00 for Dr. Seering's services, which she never paid. The Medical Security Clinic owns this cause of action and can institute an action against the Appellant to recover this amount in its own name. The purpose of Rule 17a is to avoid just such double payment as would occur here if the present judgment were allowed to stand and the subrogee elected to sue in its own name.

As to the services of Dr. Lindahl and Dr. Sprecher, the evidence clearly shows that both of these doctors examined the Appellee at the request of her counsel solely for the purpose of presenting their testimony in this trial (Tr. 87, 91, 92). The Appellee has no greater right to recover for the services of these doctors than she would have to recover for the services of a private investigator or counsel fees or any other services for which she might have had expenses in the preparation of her case for trial.

With regards to the Appellee's estimate of her expenses for aspirin, alka-seltzer and alcohol, there is no evidence whatever that such items were prescribed by any doctor or that such items were necessary as the result of the Appellee's alleged injury.

The following quotation from the case of *Carr v. Martin*, 135 Wn. Decisions 710, is controlling so far as this action is concerned:

"However, in *Torgeson v. Hanford*, 79 Wash. 56, 139, Pac. 648; *Richardson & Holland v. Owen*, 148 Wash. 583, 269 Pac. 838; *Cole v. Schaub*, 164 Wash. 162, 2 P. (2d) 669, 7 P. (2d) 1119; *Hutteball v. Montgomery*, 187 Wash. 516, 60 P. (2d) 679, we definitely decided that proof of amounts of indebtedness incurred or paid for such services as are rendered by physicians, nurses, and hospitals are not sufficient upon which to base a verdict or a judgment, but there must be evidence of their reasonable value. The

court should not have submitted the claims for special damages to the jury."

In view of the total lack of competent evidence to support the Court's awarding special damages in the sum of \$250.00, it was error for the Court to make such an award and that portion of the damages should not be allowed to stand.

ARGUMENT ON SPECIFICATION OF ERROR NO. V SUMMARY

The most the Appellee received was a sprained ankle, which was not a permanent injury. The Appellee made no complaint to her doctor the day after the accident about any back injury. The Appellee's injuries were so slight they were not noticed the next day by her supervisors at her place of employment. The Appellee should not be entitled to more than \$1000 in any event.

ARGUMENT

It is the Appellant's contention that the award of \$7500.00 as damages is grossly excessive. At most, all the Appellee suffered was a sprained ankle. This sprain was so slight that the Appellee did not have sufficient limp on the following day for her employer to notice it (Tr. 95, 96, 97). The Appellee did not

miss one day's work as the result of her alleged injury (Tr. 101, Exhibit "F"). When the Appellee went to Dr. Seering after work on the afternoon of the day following the alleged injury, she did not complain of any back injury at that time. (Exhibit "D", Tr. 80, 81). At a later time the Appellee did complain of her back. Obviously, if the Appellee had any injury to her back she sustained such injury at some time and place other than at the time alleged in this action. Apparently the Appellee injures her back quite often. It will be noted that when Dr. Lindahl examined the Appellee on March 8, 1949, her back was normal and the doctor could find no tenderness during his examination (Tr. 85). However, when Dr. Sprecher examined the Appellee on December 11, 1950, he found a very minimal amount of muscle spasm, a minimal amount of limitation and motion and considerable tenderness in the Appellee's back. It is quite understandable that a woman weighing 250 pounds demonstrating floor wax and floor polishes would strain her back on occasions. In all probability this has occurred on several occasions throughout the years. However, there is no showing whatever that the Appellee injured her back at the time and place alleged in her complaint. Dr. McConville gave a very good explanation as to one of the reasons for the Appellee's sore back. Dr. McConville found

that the Appellee had a poor posture which would result in the pains of which she complained. Dr. McConville further found no evidence of muscle spasm, that the Appellee was able to bend forward within six inches of the floor, that her lateral bending and rotation of the spine were within the normal limits, that she was able to stand on either foot and raise up on the toes, that she was able to assume a full squat and to recover without difficulty, that she was able to stand in a straddle position and sway her hips from side to side and rotate them without difficulty, that in lying down in a prone position she was able to contract the muscles of her spine equally and that she could raise both legs from the table without difficulty, and that she could raise her chest and legs from the table without difficulty. Not one of the Appellee's doctors refuted this testimony. Certainly no one with an injured back or ankle could perform such acrobatic feats as this.

As to the Appellee's ankle injury, it will be noted that the Appellee had swelling in both ankles when examined by Dr. Lindahl. Undoubtedly, a woman weighing 250 pounds would have swollen and sore ankles every time she did any appreciable amount of walking.

Under such circumstances, as the evidence shows

in this case to have existed, the Appellee suffered no more than a sprained ankle. She should not be entitled to recover more than \$1000 general damages if there is liability upon the Appellant.

With regards to the Appellee's complaint that her ankle and back have bothered her continuously since the alleged accident, it should be noted that in the Appellee's application for employment with the Seattle Public Schools filed in June, 1949, (Exhibit "E") the Appellee stated that she had no physical disability. If the Appellee has no physical disability when she seeks employment, then she has no disability for which she is entitled to recover in this lawsuit.

ARGUMENT ON SPECIFICATIONS OF ERROR NOS. VI AND VII

SUMMARY

The statements of the Appellee as to how the accident occurred clearly show that there was no negligence on the part of the driver. If the bus stopped in 50 feet the bus could not have been traveling more than 25 miles per hour. The Appellee, weighing 256 pounds, would have been the last passenger on the bus to have been thrown from her seat if she had been seated in a normal position and not guilty of contributory negligence.

ARGUMENT

It is the Appellant's contention that there is insufficient evidence for the Court to find that the Appellant's driver was negligent, and on the contrary there is an abundance of evidence to support the Appellant's contention that the Appellee was guilty of contributory negligence. The evidence will be discussed herein as though this Court were making the findings of fact. The Appellant considers that this is proper in this case since the trial court did not allow any argument whatever and therefore was not enlightened as to the contentions of the Appellant and the inferences to be drawn from the evidence.

According to the Appellee's version of the incident, the Appellant's driver approached a green traffic signal at a speed of 60 miles per hour, and when 50 feet from the traffic signal the same turned red and the driver applied the brakes, bringing the bus to a stop. Since the Appellee has had four years within which to prepare her case, and this evidence was elicited by her own counsel, the Court must take these facts at their face value as being the evidence which the Appellee wants the Court to believe.

If the traffic signal turned from green to red when the bus was 50 feet from the intersection, the driver would have to move his foot from the acceler-

ator to the brake pedal before any braking action could take place. Normally a driver can not accomplish this feat in less than $\frac{1}{4}$ of a second, but for the sake of argument let us assume that the driver could react and move his foot from the accelerator to the brake pedal in $\frac{1}{10}$ th of a second. During this $\frac{1}{10}$ th of a second the bus would travel 8.8 feet at 60 miles per hour. It is a matter of common knowledge that 60 miles per hour is the equivalent of 88 feet per second. This would leave 41.2 feet within which the bus came to a stop or in other words, decelerated from 88 feet per second to 0 feet per second. To determine the time within which the bus decelerated from 60 miles per hour to a standstill, we should determine the average velocity during deceleration, which in this case would be 30 miles per hour, or 44 feet per second, and divide that figure into the distance traveled. This gives us $\frac{41.2}{44}$ seconds, or slightly less than 1 second. During this time the Appellee's body had a forward momentum of 88 feet per second. It is obvious, therefore, that the Appellee's body would be violently thrown forward as the result of such braking action, causing her body to strike the dashboard and front of the bus rather than throwing her to the floor. The Appellee testified that the front of the bus was only 2 feet forward of her seat. The Appellee's body would travel this 2 feet

in something less than $1/40$ th of a second. It would take the Appellee's body one fourth of a second, or 10 times that space of time to fall the one foot from her seat to the floor. It is obvious, therefore, that if the accident occurred in the manner in which the Appellee describes, her body would have been plastered against the front of the bus and her primary injuries would be a fractured skull and possibly several fractured ribs and arms.

Most of the other passengers were children between the ages of 11 and 18. On an average these children would not weigh more than 125 pounds. One of the forces which would tend to hold a passenger to his seat is the friction between the passenger's body and the seat itself. The greater the passenger's weight, the greater the friction, and consequently the greater the force holding the passenger to the seat. The Appellee, weighing approximately twice as much as any other passenger, would have twice the friction between her body and the seat, holding her to her seat. There is no evidence whatever of any other passenger being thrown from his seat. Since the Appellee was the only person thrown from her seat, there must have been some reason for that fact.

The second force which would tend to keep a passenger on her seat is the force exerted by the lower

limbs working against the inertia of the body. If the Appellee were sitting in a normal position with her feet on the floor and facing towards the front, the force exerted by her lower limbs should be approximately equal to the force of the strength exerted by the other passengers in proportion to their weights. If the Appellee's limbs were strong enough to support her 256 pounds of weight in walking, they should be equally strong enough to retard her forward motion, when the bus decelerated, to the same extent as the legs of the children would retard their forward motion. Since the Appellee was moved from her seat, it is obvious then that she did not have her feet on the floor in front of her so as to exert the same force to retard her forward motion as was exerted by the other passengers. The Appellant's testimony showed that the Appellee was sitting sidewise in her seat talking to the other passengers in the rear of the bus. Sitting in this position the Appellee would not have her feet and legs in a position to retard her forward motion. Also, the Appellee would in all probability not have as much of her body in contact with the seat in this position as she would have if she were sitting in a normal position, and consequently the friction between her body and the seat would be diminished. It is under these circumstances and these circumstances only, that the Ap-

pellee could possibly slide to the floor of the bus instead of being thrown against the dashboard and front of the bus, and even then only if the deceleration were moderate.

Neither the Appellant nor any other operator of a motor vehicle can give its passengers an absolute guarantee that the vehicle will not be required to decelerate rapidly in cases of emergency while traveling upon a highway. A passenger must expect that a bus will be required to decelerate rapidly on occasions. The seats provided on a bus, if used properly by the passengers, will give them a means of protecting themselves from injury when such deceleration occurs. However, if a passenger, such as the Appellee, chooses to use the seat in some abnormal manner so as not to be able to brace themselves in the event of sudden deceleration, then that passenger is guilty of contributory negligence, and accepts the risk of what might happen.

It should be further noted that the space within which the Appellee claimed she fell was approximately 2 feet long and $11\frac{1}{2}$ feet wide. The Appellee admits she weighed 256 pounds. The Court is entitled to take judicial notice that a woman of this size would have extreme difficulty in fitting into a space this small. If the Appellee were thrown into such a small

space her injuries would be far greater and of a much different nature than those complained of by the Appellee.

It should be further noted that the Appellee claims her entire weight was thrown on her left ankle and that her back was twisted. If the Appellee had been sitting as she claimed, facing toward the front of the bus with her feet on the floor, there would have been no occasion for her entire weight to be thrown on one ankle nor would there have been any twisting motion. The only way there could have been such a twisting motion is for the Appellee to have been sitting sidewise in her seat with her right leg extending into the aisle and her left leg in front of the seat. This would have been a normal position for a person to assume when talking to persons in the rear of the bus. Such a position invites disaster regardless of how careful a driver of a bus might be. Under such circumstances the Appellee was most certainly guilty of contributory negligence, which, under the laws of the State of Washington, completely bars her from any recovery whatever.

The driver of the Appellant's bus was required to stop when traffic signals turned from green to red. There can be no negligence imputed to the Appellant's driver for stopping at a red traffic signal.

Therefore, the only possible negligence which the Appellee can claim is that of excessive speed. Obviously no braking system has ever been contrived which would stop a bus in 41.2 feet at a speed of 60 miles per hour. If the accident occurred as the Appellee claims, the maximum speed which the bus could have been traveling is somewhere in the vicinity of 20 to 25 miles per hour. No bus driver could possibly stop a bus in 50 feet if he were traveling more than that speed. There is certainly no negligence in traveling at a rate of 20 to 25 miles per hour.

It should be further noted that Army regulations require such buses to be equipped with a governor limiting the speed to 35 miles per hour. There was an abundance of testimony to the effect that this bus was equipped with such a governor and that it was operating properly. The Appellee admits she could not see the speedometer, therefore her statements as the speed of the bus are only estimates and can not stand in the face of the Appellant's testimony that the bus could not in any event have exceeded a speed of 35 miles per hour.

It is true that this Court does not have the benefit of hearing the witnesses and observe their demeanor on the stand. However, from the undisputed facts this Court should determine from the evidence that the

only conclusion which can be drawn from all the evidence is that the bus driver was not guilty of negligence and that the Appellee was guilty of contributory negligence. Since the trial judge did not have the benefit of the argument heretofore set out, this Court is in a better position than the trial court to determine the truth of what actually happened.

ARGUMENT ON SPECIFICATIONS OF ERROR
NOS. VIII AND IX

SUMMARY

The basic requirements of a trial demand that counsel have an opportunity to make an argument to the fact finding tribunal so as to point the inconsistencies of the evidence and the conclusions which should be drawn therefrom. The trial judge having denied counsel this opportunity, has denied the Appellant a fair trial.

ARGUMENT

It is the Appellant's contention that since the trial court did not allow any argument whatever, that no trial has in fact been had, and that therefore the Appellant is entitled to have this Court remand this action to the district court for a new trial.

At the conclusion of all of the evidence the trial court promptly announced its decision finding that

the Appellant's driver was guilty of negligence and that the Appellee was free from contributory negligence. No opportunity was ever given counsel on either side to make any argument whatever (Tr. 165).

It will be further noted that in making such finding the trial court considered the evidence in a light most favorable to the Appellee rather than requiring the Appellee to prove her case by a preponderance of the evidence. In other words the Court presumed the Appellant was liable until proven otherwise. It is true that an appellant court should normally consider the evidence in a light most favorable to the prevailing party, but a trial judge, on the other hand, should require a plaintiff to prove its case by a preponderance of the evidence.

As the following authorities clearly show, the argument is an essential part of a trial. If no argument has been allowed, then no trial has been had.

The following language quoted from *Wilson v. Federal Communications Commission*, 170 F. (2d) 793, at page 805, supports this contention:

"The due process guarantee of hearing draws no distinction between questions of law and questions of fact. Due process requires not only opportunity for the presentation of evidence and the cross-examination of witnesses but also op-

portunity for *argument*. *Londoner v. Denver*, 1908, 210 U.S. 373, 28 S.Ct. 708, 52 L. Ed. 1103; *Morgan v. United States*, 1938, 304, U.S. 1, 18, 58 S.Ct. 773, 999, 82 L. Ed. 1129; *Erie R. Co. v. Paterson*, 1910, 79 N.J.L. 512, 76 A. 1065. As said in *Londoner v. Denver*, where a state legislature committed the administration of a tax to a local board which enacted an ordinance of assessment allowing landowners an opportunity to file complaints and objections but no opportunity to be heard thereon:

‘If it is enough that under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations *by argument* however brief, and if need be, by proof, however informal. *Pittsburg &c. Railway Co. v. Backus*, 154 U.S. 421, 426 [14 S.Ct. 1114, 38 L.Ed. 1031]; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 171 [17 S.Ct. 56, 41 L. Ed. 369] et seq. * * *’ [210 U.S. at page 386, 28 S.Ct. at page 714, 52 L. Ed. 1103]” (Emphasis supplied).

From the quotation within the above quotation from the case of *Londoner v. Denver*, 210 U.S. 373, it is clear that the United States Supreme Court considers the argument an essential part of any hearing or trial and, the failure on the part of the court in

this instance to allow argument, denied both sides a fair trial. As stated on page 807 of the above in *Wilson v. Federal Communications Commission*, “*He who decides anything, one party being unheard, though he should decide right, does wrong.*” (Emphasis supplied). It may be said with equal force that he who decides a matter with both parties being unheard does doubly wrong.

The United States Supreme Court has spoken very clearly upon this subject in the case of *Morgan v. United States*, 298 U.S. 468, wherein the following is stated:

“A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character. The requirement of a ‘full hearing’ has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The ‘hearing’ is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The ‘hearing’ is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence

or argument, it is manifest that the hearing has not been given." (Emphasis supplied).

It will be noted in the above quotation that the Supreme Court refers to a "hearing". Authorities will be set out herein which clearly show that a hearing and a trial are one and the same thing.

The Supreme Court again spoke on this subject in the case of *Morgan v. United States*, 304 U.S. 1, where on pages 14 and 15 the following language is found:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' — essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'." (Emphasis supplied).

As indicated by the above language, when an executive branch of the Government has been given the right to make administrative determinations, such proceedings are quasi-judicial in character and the parties interested therein must be protected by

rudimentary requirements of fair play. Since the United States Supreme Court has determined that administrative hearings should be conducted with the same principle of "fair play" as a judicial hearing, then it is elementary that if it is wrong for an administrative decision to be made without argument, it is likewise wrong for a judicial decision to be made without argument. On page 18 of the above-mentioned decision the United States Supreme Court states as follows:

"But a 'full hearing' — a fair and open hearing — requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit *argument* implies that opportunity; otherwise the right may be but a barren one." (Emphasis supplied).

As noted in the above quotation, the Supreme Court considers the right to make an argument an essential part of a fair and open trial. The Court in this instance by failing to allow counsel for the parties to argue, has denied the defendant in particular one of the essential elements of a fair trial.

This principle is made increasingly clear in the language used on page 20 of the above decision as follows:

"The requirements of fairness are not exhausted

in the taking or consideration of evidence but extend to the *concluding parts* of the procedure as well as to the beginning and intermediate steps." (Emphasis supplied).

In the case of *State v. Milhollan*, 50 N.D. 184, 195, N.W. 290, the following is stated:

"The word 'hearing' contemplates an opportunity to be heard. That is, not merely the privilege to be present when the matter is being considered, but the right to present one's contention, and to support the same by proof and *argument*." (Emphasis supplied).

In *State v. City of Milwaukee*, 157 Wis. 505, 147 N.W. 50, the following was stated:

"The repeated refusal of the common council to grant either the written or oral request of the relator to hear his counsel before acting upon the report of the committee stands upon a different basis. There are at least three substantial elements of a common-law hearing: (1) The right to seasonably know the charges or claims preferred; (2) the right to meet such charges or claims by competent evidence; and (3) *the right to be heard by counsel upon the probative force of the evidence adduced by both sides, and upon the law applicable thereto*. If either of these rights are denied a party, he does not have the substantial elements of a common-law hearing. *Ekern v. McGovern*, 154 Wis. 157, 277, 142 N.W. 595, 46 L.R.A. (N.S.) 796 et seq., and cases cited. That *the word 'hearing' includes 'oral argument'* is expressly ruled by the following cases: *Miller v. Tobin* (C.C.) 18 Fed. 609, 616; *Joseph D. G. Co. v. Hecht*, 120 Fed. 760, 763, 57 C.C.A. 64; *Merritt v. Portchester*, 8 Hun. (N.Y.) 40,

45; *Babcock v. Wolf*, 70 Iowa, 676, 679, 28 N.W. 490. See, also *Akerly v. Vilas*, 24 Wis. 165 171, 1 Am. Rep. 166. Indeed the idea of the right of a person to be heard by himself or counsel when his property or his personal rights are questioned was so early and firmly imbedded into the groundwork of our jurisprudence that it is difficult to find instances where it has been challenged even in quasi-judicial proceedings. The importance and value of such right is considerable in nearly every case. *It is the office of counsel to marshal the facts proven to point out their relative importance, and to interpret them in the light of the law applicable thereto. When this is properly done, the judicial mind is enlightened, and is in condition to decide the questions* presented with full knowledge of the facts and the law involved. Its importance in the present proceeding is apparent, when it is born in mind that the evidence taken by the committee was very voluminous, was read to the common council at a number of different sessions separated by considerable intervals of time, and was wholly circumstantial in character. The right of the relator either personally or by counsel *to argue* the evidence and the law to the common council, which body alone had the right to remove, is unquestioned. *That the denial of such a right was prejudicial follows from what has been said.*" (Emphasis supplied).

The trial judge in the instance case was never enlightened by argument. The fact that the Appellee's version of the accident is absurd and incredible was never made known to the trial judge. Therefore, this Court having had the benefit of the argu-

ment of counsel is in a better position to make findings of fact than the trial judge.

Since the Supreme Court in the two Morgan cases above cited has announced the law of the land that the argument is an essential part of a fair trial, it was error for the trial Court to decide a matter without hearing argument. In *In Re Galvin's Estate*, 274 N.Y.S. 846, the following is stated:

“Each of the Constitutions guarantees to the citizen and only to him — not to any court — the privilege of saying whether or not he will be aggrieved by the proposed action of any court. This makes indispensable some preliminary notice, either actual or its presumptive equivalent, before the court acts; but the privilege not having been extended to the court, it cannot presume, or assume beforehand, without notice, what the citizen might or might not do were he notified. From this viewpoint of constitutional law, it is immaterial that in the judgment of the court he could not possibly be aggrieved by its proposed decree. The right is *his and his alone* to be judge of that before any court passes on it. It is a condition precedent to any court acting that the citizen shall have first had preliminary notice in one or other of the traditional forms, and *an opportunity to be heard*.” (Emphasis supplied).

It is the Appellant's contention that one of the principal functions of an argument is to give the respective parties an opportunity to advise the Court of their contentions as to the inferences which should be drawn from the evidence. If this opportunity had

been given the Appellant in this instance it could have conclusively proved to the Court that it would be physically impossible for the Appellee to have slipped from her seat to the floor of the bus in the manner described by her.

The Appellant could not point out the inferences to be drawn from each bit of testimony as it was presented. The time to present inferences and conclusions to be drawn from the testimony comes when counsel is permitted to argue. The Court, having denied the Appellant the right to argue, has denied the Appellant the right to point out the inferences and conclusions which should properly be drawn from the evidence.

Counsel, in properly preparing a case, must of necessity carefully weigh the evidence which will be presented. In the process of such preparation, counsel spends many days and weeks and sometimes months in considering the reasonable and logical inferences and conclusions to be drawn from the evidence. This thought process cannot be accomplished in a few seconds. The Court having heard the evidence is not in a position to give due consideration to such evidence unless he, too, carefully considers and deliberates upon the same in the same manner which counsel have done in the preparation of their cases. The two or three sec-

onds within which the Court announced its decision at the conclusion of the evidence in this case, clearly shows that the Court could not have gone through this mental process. Had the Court listened to arguments presented by counsel, the Court would have had the benefit of all of the thought processes which had gone into the preparation of this case by counsel on both sides. By failing to give counsel this opportunity, the Court has denied both sides, and the Appellant in particular, the right to be heard. For decisions holding squarely that a hearing and a trial are one and the same thing, see *Miller v. Tobin*, 18 Fed. 609, and *Joseph Dry Goods Co. v. Hecht*. 120 Fed. 760.

The Court could not cure the error of announcing its decision without argument by thereafter allowing the Appellant to submit a memorandum of authorities. If the Court had changed its decision after considering the memorandum of authorities, then Appellee would have been denied the right to argue the matter and could have rightly claimed that she had not been given a fair trial. The Court having once expressed its opinion, the error was then and there committed and could in no wise be cured. If a juror should express his opinion prior to the argument of a case the Court would no doubt dismiss that juror without any hesitancy since it would be unfair to

argue to a biased juror. In this case the equivalent of the entire jury panel expressed its opinion before argument. It is equally unfair for counsel to have to argue to a Court which has already made a determination without benefit of argument. As the decisions above quoted have stated, a "full hearing" or, in other words, a trial, requires argument before the decision is made and not afterwards.

ARGUMENT ON SPECIFICATION OF ERROR NO. X ARGUMENT

The Appellant called as a witness Mr. Harold R. Barton, who was the superintendent of the Vashon Schools at Vashon Island. Mr. Barton testified that he had occasion to observe the Appellee approximately once a week from November, 1948, to June of 1949, and that he did not observe anything that would indicate that she had any physical disability.

Further, the question was asked of the witness "Will you state whether or not you recall submitting a report to the Seattle School District on Esther Westfall's qualifications sometime in 1949?"

To this question opposing counsel made the following objection: "If your Honor, please, I object to this type of evidence being brought out. I can't see where it has any bearing." The Court sustained the

objection, whereupon counsel for the Appellant advised the Court: "My question is preliminary, your Honor. I believe it would be competent for him to testify what he put in that report in regard to her physical ability and that was my purpose." The Court again sustained the objection.

The Appellant contends that it was error for the Court to exclude this evidence. Certainly reports written by the Appellee's employer which would include statements as to her physical ability are competent evidence. The testimony of this witness would be far more competent and convincing if the Appellant were allowed to show that the same information was contained in a report made by the witness at a time when his memory and knowledge of the facts were fresh in his mind and, further, that the report was made at a time when no litigation was pending.

The evidence excluded by the Court has a material bearing upon the extent of the Appellee's damages. The Appellee testified, and apparently convinced the Court, that she was permanently disabled. The Appellant should have the right to refute this evidence and the trial judge in denying the Appellant that right has denied the Appellant a fair trial.

CONCLUSION

The Appellant has shown herein that the Appellee's cause of action was barred by the statute of limitations of the State of Washington, and that since the Appellant's agent could not be sued by virtue of such statute of limitations, the Appellant can not be sued. Further, the Appellant has shown this Honorable Court that the Appellee's cause of action is further barred by the doctrine of laches.

The Guest statute of the State of Washington and the decisions rendered by the Supreme Court of the State of Washington upon such statute clearly show that under the laws of that state the Appellee has no right to recover.

As shown in this brief, the Appellee has presented no evidence entitling her to recover special damages in any amount, nor has she shown any evidence which would entitle her to recover general damages in the sum of \$7500.00. Even if this Court should find liability on behalf of the Appellant, the amount of the general damages should be reduced to not more than \$1000.00.

As further shown in this brief, the evidence clearly shows that there was no negligence on the part of Appellant's driver, but on the contrary the Appellee was guilty of contributory negligence.

The trial court having refused to allow counsel to argue the case, has denied the Appellant a fair trial, and if for no other reason this cause should be remanded for a new trial on this ground.

Having thus pointed out the errors committed by the trial judge, the Appellant respectfully requests this Court to reverse the decision of the trial court and order the entry of a judgment for the Appellant. In the event this Court does not find it proper to reverse the decision of the trial judge, then, at least, this case should be remanded to the district court for a new trial.

Respectfully submitted,

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IN THE
United States
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vs.

ESTHER WESTFALL,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

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HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF APPELLEE

JURISDICTION

This action was brought by the Appellee pursuant to the Federal Tort Claims Act (Section 1346, Title 28, U.S.C., and Chapter 171 of Title 28, U.S.C.). The jurisdiction of this Court to review the decision of the district court is set out in Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

Appellee commenced this action on the 21st day of April, 1950, and seeks to recover for injuries sustained while a passenger on a bus operated by the United States Army (Tr. 12).

On February 20, 1946, at approximately eight o'clock p. m. Appellee was a passenger on a certain United States Army Bus belonging to the Appellant, and being used at the time to transport Appellee and others as passengers therein from Seattle to Fort Lewis, Washington, for the purpose of providing recreation by way of entertainment for members of the United States Military Forces stationed at Fort Lewis, pursuant to request therefor by agents of the Appellant, duly authorized and acting within the scope of their authority. The said bus was being driven by a soldier of the United States Army, pursuant to instructions from his superior officers, and he was acting within the scope of his authority and in the course of his employment as an employee of Appellant (Tr. 34, 62, 63, 65, 67, 69). At a point near the intersection of South Tacoma Way and South Thirty-eighth Street in the City of Tacoma, Washington, while proceeding in a southerly direction, at the time mentioned, the said soldier drove the said bus negligently and at an excessive and negligent rate

of speed and negligently applied the brakes on the said bus and negligently forced it violently and suddenly to stop, and Appellee was thrown suddenly and with great force from her seat on said bus to the floor (Tr. 35, 63, 65, 67, 70).

As a direct and proximate result of the negligence of the Appellant, through its agent as aforesaid, the Appellee suffered severe sprain of the lower back and left ankle, bruises, contusions and severe nervous shock. These injuries resulted in continuous and severe pain and suffering to this Appellee, necessitated frequent medical treatment for a period of approximately one year, and intermittent treatment thereafter. They have further occasioned a marked and permanent weakening of the Appellee's lower back and left ankle ligaments and muscles. All of which have and will continue to interfere with and reduce Appellee's capacity for the pursuit of her work and earning ability (Tr. 35-45, 68, 70-76, 84-90). Appellee has necessarily sustained special damages for expenditures for medical treatment and medicines in the total sum exceeding Two Hundred and Fifty Dollars (\$250.00), all of which amounts are reasonable (Tr. 44, 76, 77, 86, 91).

The negligent acts and omissions of the Appellant, as aforesaid, were contrary to the laws of the

State of Washington and the ordinance of the City of Tacoma, and the same were done under circumstances where the Appellant, if a private person, would have been liable to Appellee for injuries and damages proximately resulting therefrom (Tr. 3-8).

The transportation of Appellee from Seattle to Fort Lewis, as provided by Appellant to Appellee, was in consideration of and as a condition to the providing entertainment for said armed forces by Appellee (Tr. 34, 35, 62, 65).

At the conclusion of the evidence and after due consideration the Court awarded the Appellee judgment in the sum of Seven thousand five hundred dollars (\$7,500.00), as general damages, and the sum of Two hundred fifty dollars (\$250.00), as special damages, being a total sum of Seven thousand seven hundred fifty dollars (\$7,750.00), plus her costs, against Appellant. (Tr. 26).

RESTATEMENT OF THE QUESTIONS RAISED

Appellee considers the questions raised by Appellant's Specifications of Error to be as follows:

1. In an action brought under the Federal Tort Claims Act, (Section 1346, Title 28, U.S.C.A., and Chapter 171 of Title 28, U.S.C.A.), within the time specified in the Act, is the statute of limitations of the

state within which the cause arose applicable?

Answer by the Court in the negative.

2. In an action brought under the Federal Tort Claims Act, *supra*, if the statute of limitations of the state within which the cause arose is applicable, must the statute of limitations be pleaded as a defense?

Answered by the Court in the affirmative.

3. In an action brought under the Federal Tort Claims Act, *supra*, must laches be pleaded as an affirmative defense?

Answered by the Court in the affirmative.

4. Is Appellee guilty of laches?

Answered by the Court in the negative.

5. Is the Appellee herein a "guest or licensee" within the meaning of Section 6360-121 of Remington's Revised Statutes of the State of Washington, and thereby barred from recovery against Appellant?

Answered by the Court in the negative.

6. Is the evidence sufficient to sustain the Court's finding that Appellee is entitled to \$250.00 as special damages?

Answered by the Court in the affirmative.

7. Is the evidence sufficient to sustain the

Court's finding that Appellee is entitled to \$7,500.00 as general damages?

Answered by the Court in the affirmative.

8. Is the evidence sufficient to sustain the Court's finding that Appellant's driver was guilty of negligence?

Answered by the Court in the affirmative.

9. Was the evidence sufficient to sustain the Court's finding that Appellee was not negligent?

Answered by the Court in the affirmative.

10. Was Appellant accorded the right to be heard?

Answered by the Court in the affirmative.

11. Is the evidence sufficient to sustain the Court's Findings of Fact?

Answered by the Court in the affirmative.

12. With expert testimony available as to Appellee's physical condition, did the Court abuse its discretion in excluding a report by a witness, as to the general educational qualifications of Appellee, who was admittedly not a medical expert?

Answered by the Court in the negative.

ARGUMENT IN SUPPORT OF JUDGMENT

Appellant in its Brief sets out ten Specifications of Error as the basis for this appeal. Appellee's argument in support of the judgment appealed from is herewith submitted by way of answer to Appellant's Specifications of Error, in the order in which said Specifications are set forth in Appellant's Brief.

ARGUMENT IN ANSWER TO SPECIFICATION OF ERROR No. 1

SUMMARY

If the statute of limitations of the State of Washington were applicable to such actions as Appellee's herein, under the laws of said State, and under Federal Rules of Civil Procedure, such statutes must be pleaded as an affirmative defense. The action is one which does not exist at common law and has its origin in a statute which conditions the right of action to its commencement within a limited period of time, the time specified is a part of the substantive right and not a procedural requirement. The statute of limitations of the State of Washington is not applicable to Appellee's cause of action.

ARGUMENT

1. If the statute of limitations of the State of Washington were applicable to Appellee's action here-

in, or any statute of limitations, same were not pleaded timely or affirmatively by Appellant, and cannot, upon conclusion of the presentation of evidence in the case or upon appeal, be asserted as a defense barring recovery by Appellee herein. Remington's Revised Statutes of the State of Washington, Section 115, relating to limitation of actions, provides:

"Actions can only be commenced within the periods herein prescribed, after the cause of action shall have occurred, except when in special cases a different limitation is prescribed by statute, *but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.*" (Italics supplied).

In *State ex rel. Teeter v. Court*, 110 Wash. 255, the Supreme Court of the State of Washington held that the defense of the statute of limitations is waived if not timely interposed.

In *Dibble v. Bellingham Bay Lumber Company*, 163 U.S. 63, it was held that Federal Courts will follow the state court in construction and application of statutes of limitation.

The defense of the statute of limitations, regardless of the rules of civil procedure of the state, is required by the Federal Rules of Civil Procedure, Rule 8(c), Title 28, U.S.C.A., to be set up affirmatively.

In the case of *Weber v. United States*, D.C. N.V., 1948, 8 F.R.D. 161, it was held that the defense of

the statute of limitations in an action under the former Section 931, et seq., of the Federal Tort Claims Act, Title 28, U.S.C.A., brought in Federal District Court in New York, had to be set up affirmatively in answer pursuant to Federal Rules of Civil Procedure, Rule 8(c), supra, and could not be raised by motion to dismiss complaint pursuant to New York Rules of Civil Practice, since the federal law prevailed over the state rule.

Appellant did not plead the defense of the statute of limitations by answer, demurrer, or otherwise, affirmatively or timely and is thereby precluded from subsequently asserting same as a bar to recovery by the Appellee.

2. The statute of limitations of the State of Washington is not applicable to Appellee's cause of action herein.

Section 2401, Chapter 161, U.S.C.A., Title 28, relating to the time for commencing action against the United States, which was enacted June 25, 1948, c. 646, 62 Stat. 971, and amended April 25, 1949, c. 92, Sec. 1, 63 Stat. 62, provides as follows:

"A tort claim against the United States shall be forever barred unless action is begun within two years after such claims occurred or within one year after the date of enactment of this amendatory sentence, whichever is later . . ."

The section quoted clearly supersedes any provision of the statutes of the State of Washington relating to commencement of such actions where, as in this case, the United States is a defendant. *Jefferson v. U. S.*, D.C. Md., 1948, 77 Fed. Suppl. 706; *Sweet v. U. S.* D.C. Calif., 1947, 71 Fed. Suppl. 863; *Kohn v. U. S.*, Calif., 1948, 75 Fed. Suppl. 689; *State of Maryland v. U. S.*, 195 Fed. (2d) 869.

In the *Kohn case*, *supra*, the court held that an action instituted under former Section 931, Title 28, U.S.C.A., and the California one year statute of limitations could not be pleaded as a defense.

In the *State of Maryland v. United States*, *supra*, the Circuit Court of Appeals for the Fourth Circuit found that under Maryland law the limitation of twelve months prescribed in the state's wrongful death statute was a condition precedent to the right to maintain an action thereunder, but held that under the Federal Tort Claims Act, the law of the state must be considered for purpose of defining the actionable wrong for which liability shall exist on the part of the United States, but the Act itself fixes the limitation of time within which action shall be instituted to enforce the liability.

This action was brought within the time specified in the Act. The 1949 Amendment, in effect

at the time this action was commenced, was intended to revive such otherwise expired tort claims against the United States occurring on or after January 1, 1945. 1949 U.S. Code Cong. Service, p. 603.

ARGUMENT IN ANSWER TO SPECIFICATION OF ERROR No. 2

SUMMARY

Laches is an affirmative defense and must be pleaded. If it is not, as here, it is not available. Likewise, where a right of action is conferred by statute for a specified period of time, the doctrine of laches is not available as a defense to action commenced within that period of time. Appellee has not in any way been guilty of laches, and her actions have in no way prejudiced the position of the Appellant.

ARGUMENT

1. Appellant's plea of laches is not timely.

Under the Statutes of the State of Washington, Remington's Revised Statutes, Sec. 263, laches is an affirmative defense and required to be pleaded by answer or demurrer. The statute provides:

"If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the

complaint does not state facts sufficient to constitute a cause of action . . .”

Also under Federal Rules of Civil Procedure laches is an affirmative defense, and must be pleaded affirmatively. The Federal Rules of Civil Procedure, Sec. 8 (c), Title 28, U.S.C.A., provides:

“In pleading to a preceding pleading, a party shall set forth affirmatively . . . laches . . . statute of limitations . . .”

In *Thierfield v. Postman's Fifth Avenue Corporation*, D.C. N.Y., 1941, 37 F. Supp. 958, it was held that the defense of estoppel or laches must be affirmatively pleaded. See, also, *Bergeron v. Monsour*, 152 F. (2d) 27.

Appellant herein did not plead or raise the question of laches as a defense, either by answer or demurrer, or in any manner until conclusion of the presentation of evidence. To seek to interpose it as a bar to Appellee's recovery at such time, or upon appeal is too late. Appellant seeks to draw its support for the defense of laches from the evidence, and the rule is particularly applicable where laches is not apparent from the face of the complaint. See *LaVicchia v. First National Bank of Tampa*, 112 F. (2d) 145.

2. Appellee's right of action is conferred by statute for a specified period of time, and this action was commenced within such period of time.

Appellee commenced her action on April 20, 1950. The right to commence such action was extended to April 25, 1950, by Act of Congress, amending Section 2401, Chap. 161, U.S.C.A., Title 28, as heretofore set out. This revived Appellee's right of action for a period of twelve months, and it hardly can be said that she was guilty of laches in acting within that period.

Appellant contends that Appellee is guilty of laches because her action was not commenced within the period of the statute of limitations of the State of Washington applicable to such action. Certainly this cannot be true where there is an express reviver of such action, as in this case.

The case of *Westfall Larson & Company v. Allman-Hubble Tugboat Company*, 73 F. (2d) 200, cited by Appellant in its Brief at p. 16, is not in point. There recovery was sought in Admiralty for a non-maritime tort, action on which was not governed, as in the present case, by specific Federal statutory provision as to the time within which such an action might be commenced. The Admiralty court, "by analogy", permitted itself to be governed by the state statute of limitations covering actions of the nature disclosed by the libel. With respect to this case, attention is also invited to the consideration given by

the court to the fact that appellants therein made certain misleading representations to appellees and conceded that they could have brought their libel against appellees within the period prescribed by the state statute of limitations for actions of that nature, and to the conclusion of the court that it had no jurisdiction as to appellant's demand for reimbursement for sums paid out by it in connection with actions originated in the state court.

Numerous Washington cases, including those cited by Appellant, discuss the doctrine of laches. None were found which applied the doctrine, *particularly within the period of the statute of limitations*, and certainly not in a case where, as here, there was involved a statutory revival of a right of action for a specified period of time. The decisions do uniformly indicate that to constitute a valid defense laches must be pleaded affirmatively, and must in fact amount to estoppel. Illustrative of the Washington decisions; in *State v. Plummer*, 130 Wash. 135, the court, headnote No. 2, says, with reference to laches:

“ . . . Mere lapse of time, short of the statute of limitations, . . . does not amount to laches, precluding recovery, where the county was not *induced* to alter its position by the delay.”
(Italics supplied).

The court further stated in the body of its opinion that:

“To constitute laches not only must there have been delay in the assertion of the claim, but some change of condition must have occurred which would make it inequitable to enforce the claim”

The tenor of the Washington and Federal decisions is that, in addition to the lapse of any time permitted by statutes of limitation, there must be elements of estoppel, amounting to an inducement by the party seeking recovery to the other to change or alter his position, or leading to some change of condition which would make it inequitable to permit recovery.

In enacting the 1949 Amendment, *supra*, reviving actions such as Appellee's herein, Congress must have considered and waived possible disadvantages resulting from lapse of time and changing conditions.

3. Appellee herein has not in any way been guilty of laches and her actions have in no way prejudiced the position of Appellant.

After the injuries herein complained of, Appellee promptly advised Appellant, through its agents of the accident and of the resulting injuries to her. She has continued since the time of the accident to apprise Appellant, through its agents, of the seriousness of

her injuries and the resulting damage and loss to her, and sought to effect some settlement with appropriate agents of Appellant with regard thereto.

Appellee pressed her claim against the Appellant both orally and in writing, from the time it became apparent that she was seriously injured until it became apparent, in April, 1950, that she not only would be allowed nothing on her claim but that she could not even secure any determination of it, favorable or otherwise, before April 25, 1950, after which time she would again be barred from seeking redress in the courts. (Tr. 137).

The actions of the various agents of the Appellant, as reflected by the undisputed evidence in this case, taken with regard to the matter, throughout the period of time since the accident, clearly establish that they had adequate notice of Appellee's claim, that she was asserting it, and that a determination thereof prior to April 25, 1950, was of vital importance to her, since after that date she would have no right to initiate action before the Courts. This is clearly substantiated by the testimony of Appellant's witnesses as to their actions taken from time to time, and particularly by the testimony of the alleged driver of the vehicle, Mr. Yingling, that he had on numerous occasions during the past four years been contacted

by government representatives concerning the matter. (Tr. 119).

Appellant contends Appellant's (Br. p. 19) that had the action been brought sooner, Appellant would undoubtedly have had more adequate records and had the benefit of fresher memories. There is nothing by way of evidence to substantiate this contention, nor is there evidence of any kind which indicates that the actions of Appellee in any way induced a change in or prejudiced Appellant's position or conditions. It does appear from the testimony throughout the case that Appellant's agents were remiss in failing to keep proper records and in failing and neglecting to accord the accident subject hereof and Appellee's claim based thereon prompt and diligent attention. (Tr. 126, 122).

ANSWER TO ARGUMENT ON SPECIFICATION OF ERROR No. 3

SUMMARY

Appellee was not a "guest or licensee" of Appellant at the time of the accident subject to this action, and therefore, did not come within the terms of the "guest statute" of the State of Washington, Remington's Revised Statutes, Section 6360-121, prohibiting a recovery for personal injuries sustained. Since

Appellee was not a "guest or licensee" within the meaning of said "guest statute", her legal status at the time is immaterial, and she is entitled to recover from Appellant for the injuries sustained by her as a result of the negligence of Appellant's agent.

ARGUMENT

1. Appellee was not a "guest or licensee" within the meaning of the Washington "guest statute", *supra*.

Counsel for Appellant's entire reasoning with reference to the applicability of the Washington "guest statute", *supra*, and his treatment of the authorities cited in Appellant's Brief appear to be based upon their erroneous assumption that the evidence established that Appellee made the trip in question solely for her own or the group's pleasure, as a chaperon for her children, and to participate in a "party" or "social gathering" where refreshments were served (Appellant's Br. 21, 23). Counsel does not substantiate these conclusions by any reference to testimony or evidence introduced. In fact none of these conclusions were established or even seriously suggested by any of the witnesses as being the occasion for the trip or the motive or reason of the Appellant or its agents, either in securing the services of Appellee and her troupe or in providing the transportation

which took them to Fort Lewis and thus enabled them to render services to Appellant by way of providing entertainment for the soldiers stationed there.

Appellee, at the time the accident occurred, was a passenger on an army bus en route to Fort Lewis, Washington, with a U.S.O. troupe, for the purpose of providing entertainment for the soldiers stationed there. Appellee was director and a member of the U.S.O. troupe. The entertainment was provided at the request of agents of Appellant, and the soldier driving Appellant's vehicle at the time of the accident had been directed to transport Appellee and her troupe from Seattle to Fort Lewis for the purpose indicated (Tr. 34, 62, 103).

The United States performs a duty to its armed forces when it affords recreation. Recreation is a part of the soldier's duty and within the scope of employment, *Murphey v. United States*, 179 F. (2d) 743.

Appellee herein comes within the rule that where the operator or owner of the automobile is compensated in a substantial and material sense as distinguished from a social benefit the occupant is not a "guest or licensee" within the meaning of the Washington "guest statute", *supra*. In the case of *Scholz*,

et al. v. Lever, et al., 7 Wash. (2d) 76, the Supreme Court of the State of Washington held:

“Rem. Rev. Stat., Vol. 7A Sec. 6360-121, . . . does not apply if there is payment for transportation, regardless of the existence of a previous contract, and such payment need not necessarily be made in money, it being sufficient if the presence of the occupant directly compensates the operator or owner in a substantial and material or business sense . . .”

In the body of the opinion in the Scholz case, *supra*, the court states:

“ . . . the meaning of the words invited guest or licensee can best be ascertained by considering them in connection with the phrase which immediately follows in the statute, that is, ‘without payment for such transportation’. The qualifying phrase limits the scope of invited guest or licensee by indicating plainly that gratuitous carriage only is intended . . .”

“Such is the construction which the courts in other jurisdictions have generally given to host and guest statutes substantially similar to the Washington . . .”

The court in the Scholz case cites a number of California, Oregon, Connecticut, Michigan and Iowa cases and refers to the case of *Syverson v. Berg*, 194 Wash. 86, and the case of *Fuller v. Tucker*, 4 Washington (2d) 426, as follows:

“ . . . the court held that the host and guest statute precluded recovery by the person transported under the circumstances there presented, but

the requirements necessary to constitute payment for transportation such as to avoid the bar of the statute were specifically delineated. Such requirements are (1) actual or potential benefit in a material or business sense resulting or to result to the owner or occupant, and (2) that the transportation be motivated by the expectation of such benefit."

The rule as laid down by the court in the Scholz case has been consistently adhered to in this state, and is clearly applicable in the instant case. Subsequent Washington decisions which substantiate this view are *Engel v. Interstate Transit Co.*, 9 Wash. (2d) 590, *Pence v. Berry*, 13 Wash. (2d) 564, and *Finn v. Drtina*, 30 Wash. (2d) 814.

The Finn case, cited in Appellant's brief, page 24, with reference to joint adventurers, cites the rule of the Scholz and Pence cases, *supra*, with approval.

2. Since Appellee was not a guest or licensee "within the meaning of the Washington guest statute" her legal status at the time is immaterial insofar as the applicability of said statute is concerned, and she is not thereby barred from recovery herein.

In the Pence case, *supra*, the court held:

"The automobile guest statute, Rem. Rev. Stat. Vol. 7A, Section 6360-121, does not bar recovery against the owner or operator of an automobile concerned in an accident by anyone other than an occupant who is an invited guest or licensee,

without payment for transportation, hence, if an occupant of an automobile is not a guest or licensee of the owner or operator thereof at the time of the accident in which the occupant is injured, the exact nature of the legal status at the time is immaterial”.

The decisions of the United States Supreme Court in the *Feres*, *Jefferson* and *Griggs* cases rendered December 4, 1950, being Nos. 9, 29 and 31 of the October term, and cited in Appellant's Brief on page 27, are clearly distinguishable from the present case and the authorities sustaining the position of the Appellee hereon on the bases of the facts involved. The plaintiffs therein were military personnel involved. The holding of the court in those cases was based upon their finding that military personnel comprised a special and unique group, for which no comparable or parallel liability previously existed, and belief that no new one was intended to be created. In addition, provision had long since been made by Congress for such personnel through the respective government agencies in which they served.

ARGUMENT IN ANSWER TO SPECIFICATION
OF ERROR No. 4
SUMMARY

The evidence is sufficient to sustain the Court's finding that Appellee is entitled to special damages in the sum of \$250.00.

1. The evidence established conclusively that the services of Dr. A. H. Seering to Appellee for injuries resulting from the accident subject hereof were billed for and of the reasonable value of \$114.25, that no insurance company paid for these services, that Appellee paid for these services under a contractual agreement between her and the Medical Security Clinic, by pre-payment for medical services at the rate of \$3.00 a month from 1943 to 1948 (Tr. 44, 76, 77).

The testimony indicates that the Medical Security Clinic to whom Appellee made payment for services rendered by Dr. A. H. Seering, possibly has a right of subrogation in the amount charged for such services. (Tr. 76, 77). If true, this would not preclude Appellee from recovery therefor.

Appellant in its Brief, page 31, cites the case of *United States v. Aetna Casualty Company*, 338 U. S. 366, to the effect that if a subrogee has paid the entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. This

case is considered applicable to the instant case by Counsel for Appellant on the grounds that *all of the services of Dr. Seering* were paid by the subrogee, the Medical Security Clinic. (Appellant's Brief 31). Counsel for Appellant overlooks the fact that the case cited states that a subrogee is the only real party in interest and must sue in its own name, "*If the subrogee has paid the entire loss suffered by the insured . . .*" There is no such evidence in this case of the Medical Security Clinic having "paid the entire loss" of Appellee. To require that recovery of the \$114.25 item of damage be in the name of a possible subrogee would amount to a severance of Appellee's cause, and subject Appellant to numerous actions.

In the State of Washington it is well established that where a subrogee's claim represents a part of an injured person's damage only, the suit must be in the injured person's name, or, if the injured person is hostile, he must be made a party defendant.

In the case of *Wood & Iverson, Inc. v. Northwest Lumber Company*, 138 Wash. 203, the Supreme Court of the State of Washington held:

"An action for the loss of camp equipment caused by a forest fire negligently set out by the defendant is not effected by the fact that plaintiff had recovered insurance on the account

of the fire loss, and given a written subrogation agreement to the insurance company . . .”

In the body of the opinion in the Northwest Lumber Company case, at page 536, *supra*, the court states:

“ . . . but respondent contends that this item, to the extent of \$5,600.00 received by the appellant as insurance in the camp equipment, should be disallowed, because the appellant by a written subrogation agreement transferred its rights to the insurance companies and they not being parties here cannot be bound by any judgment here entered and may still sue respondent on their written assignments. The written subrogation agreement, if made, adds nothing to the case, as in equity the insurer, upon paying the loss, is always subrogated to the rights of the insured and, as we see it, the question is no longer an open one, having been determined against respondents’ theory by this court in *Alaska Steamship Co. v. Sperry Flour Co.*, 94 Wash. 227, which case has been followed in *Criez v. Sunset Motor Co.*, 123 Wash., 604, and *Schueitzer v. Weyerhaeuser Timber Co.*, 128 Wash. 186.”

In the instant case Appellee is the real party in interest and may properly sue for all damages sustained.

2. The only and uncontroverted testimony as to the services of Drs. Lindahl and Sprecher establishes that Appellee went to them for advice or treatment. Further, that said doctors did examine and prescribe a course of treatment for Appellee. That their charges

therefor were \$20.00 and \$15.00 respectively, and that such charges were reasonable (Tr. 87, 90, 92, 96).

3. Appellee's testimony, substantiated by that of other witnesses, and none of which was controverted, established that she suffered frequently from her injuries sustained in the accident subject hereof, necessitating home treatments, medication and use of such drugs as aspirin, salves, rubbing alcohol, and other medicines that her expenditures therefor amounted to \$150.00 (Tr. 42, 44, 45, 51, 68, 70, 71).

The uncontroverted evidence as to Appellee's special damages is more than sufficient to sustain the Court's award therefor in the sum of \$250.00.

ANSWER TO ARGUMENT ON SPECIFICATION OF ERROR No. 5

SUMMARY

The Court found that as a direct and proximate result of the negligence of Appellant, through its agents, Appellee suffered injuries and damages as follows: Severe sprain of the lower back and left ankle, bruises, contusions and severe nervous shock; that these injuries resulted in continuous and severe pain and suffering to Appellee; necessitated frequent medical treatment for a period of approximately one year, and intermittent treatment thereafter: that

said injuries occasioned a marked and permanent weakening of Appellee's lower back and left ankle ligaments and muscles: that Appellee's injuries and resulting condition have and will continue to interfere with and reduce Appellee's capacity for the pursuit of her work and in earning a living; that as a consequence, Appellee has sustained general damages in the sum of \$7500.00 (Tr. 21). The Courts findings are amply sustained by the evidence and more than justify the award made for general damages.

ARGUMENT

The evidence established conclusively that Appellee sustained a severe sprain of her back and left ankle (Tr. 35, 71, 73, 74, 89, 90). The testimony by those with actual knowledge of Appellee's condition established the fact that this condition continued in an aggravated and painful state, and still continues, occasioning Appellee much pain and suffering, that the inconvenience to her was pronounced and will continue to be so.

The testimony by expert medical witnesses, established with more than reasonable certainty that Appellee's injuries are permanent in nature (Tr. 89, 90). Evidence of the weakened, tender and strained condition of the ligaments and muscles affected by the severe sprain to Appellee's leg and back was found

by all medical examiners, and latest by Drs. McConville and Sprecher, almost five years after the date of the accident (Tr. 89-92, 132).

Dr. McConville, Appellant's expert witness, acknowledge from his own examination of Appellee, a possible continuing disability of 5% of total. (Tr. 132). Drs. Sprecher, Lindahl and Seering all concluded and testified that there was residual disability and that Appellee should restrict her activities. Dr. Sprecher further testified that surgery might help, but that in any event, Appellee could not be made whole in that her strength in leg and back are decreased and use thereby limited (Tr. 90, 91).

Uncontroverted testimony establishes that Appellee has been forced to delegate all of her usual household work and duties to others (Tr. 71). The evidence establishes that the overall average of Appellee's earnings since the injuries sustained by her have decreased as a result of such injuries at least \$50.00 per month, despite the fact that with her family entirely dependent on her she found it necessary much of the time to undertake to work as she had prior to sustaining the injuries (Tr. 39, 40, 42, 44); that Appellee was finally forced to abandon employment which required regular attendance or being much on her feet, and to develop a means of

earning income which would enable her to arrange her own work schedule and avoid work or movement which would aggravate her condition (Tr. 40).

It appears obvious from the evidence that Appellee's loss of earnings due to impairment of earning capacity during the period since her injuries were sustained to date of judgment by trial Court, alone had included a loss of more than \$50.00 per month for more than 30 months or in excess of \$1600.00.

The evidence established that Appellee's life expectancy was 26 years at the time this case was tried (Tr. 75, 76): that her earning capacity has been reduced by a minimum of \$50.00 per month and that it will be necessary to continue to restrict her activities. It is obvious that Appellee's loss will, in fact far exceed the total amount awarded by the Court as general damages.

As to Appellee's right to recover and the measure of damages the Court's attention is invited to the opinion of the Supreme Court of the State of Washington, in the case of *Dyal v. Fire Company's Adjustment Bureau*, 23 Wash. (2d) 515, wherein the court held that the measure of damages for personal injuries in such a sum, insofar as it is susceptible of estimate in money, as will compensate the injured person for all losses sustained as the natural and

proximate consequences of the wrongful act or omission of the defendant and which are established with reasonable certainty, and includes compensation for pain and suffering, loss of time, medical attention and support during the period of disability, and for such permanent injury and continuing disability as the injured person may have sustained.

As to the Court's discretion as to the amount of damages, attention is invited to the case of *The City of Panama*, 101 U.S. 453, which arose in the State of Washington, and wherein the court held that in an action for injuries there can be no fixed measure of compensation for pain and anguish of body and mind nor for permanent injuries to health and constitution, but the result must be left to the good sense and deliberate judgment of the tribunal entrusted with the duty of making determination.

The evidence in the instant case amply sustains the Court's award to Appellee of \$7500.00 by way of general damages.

ANSWER TO ARGUMENT ON SPECIFICATIONS OF ERROR NOS. 6 AND 7

SUMMARY

The conclusions drawn and reasoning indulged by Counsel for Appellant in its Brief with reference

to the questions concerning negligence and contributory negligence are specious, but with no substantiation in the facts as established herein. The evidence established and is sufficient to sustain the Court's findings that Appellant's driver was negligent and that Appellee was no contributorily negligent.

ARGUMENT

Testimony of numerous witnesses, uncontradicted except by Appellant's alleged driver of the vehicle involved establishes that the driver approached the scene of the accident at the intersection of South 38th Street and South Tacoma Way in the City of Tacoma, Washington, driving in a violently reckless manner and at an excessive rate of speed, despite protests of such conduct having been made by Appellee, and upon the traffic light at said intersection changing from green to red, violently slammed the brakes on said vehicle, negligently bringing it to a sudden and unusual stop, thereby throwing Appellee from her seat to the floor of the bus and injuring her (Tr. 35, 36, 63, 65, 70, 141, 143, 162, 163).

The great preponderance of the testimony, again, contradicted only by Appellant's alleged driver of the vehicle involved, established that the vehicle involved in the accident subject hereof, contrary to the impression Counsel for Appellant sought to leave by intro-

ducing in evidence photographs of a new bus which admittedly was not of the vehicle in question, which was an old bus, with no protective railing in front of the seat occupied by Appellee (Tr. 56, 57, 58, 159). Testimony by Appellant's alleged driver of the vehicle involved in the accident subject hereof, Mr. Yingling, tending to contradict the uniform version of essential details of the incident and the negligent acts of the driver, as set forth, *supra*, becomes irrelevant and of no force, as does the testimony of Appellant's other witnesses concerning maintenance and condition of the vehicles at Fort Lewis, when testimony by other witnesses developed the fact that he, Mr. Yingling, was not the driver of the vehicle on which Appellee and the U.S.O. troupe were riding when the negligent acts of the driver thereof occasioned the accident resulting in the injuries to Appellee. The testimony of these other witnesses establish fairly conclusively that Mr. Yingling was driving an army vehicle and transporting this same U.S.O. troupe from Seattle to Fort Lewis several weeks before the accident in which Appellee was injured, i.e., on February 20, 1946, and that when at a point south of the City of Tacoma, and between that City and Fort Lewis, also on United States Highway No. 99, an incident occurred wherein another vehicle pulled from a side road onto the highway in front of Mr. Yingling ne-

cessitating a sudden stop which threw a member of the troupe, Mrs. Bruck, from her seat, nearly to the floor of the bus. Further, that Mr. Yingling was not the driver of the vehicle at the time and place of the accident subject of this action, was not present, and in fact had no knowledge whatever of it (Tr. 157, 158, 159, 160, 161, 162, 163, 164, 165).

There is no direct testimony of any acts of negligence on the part of the Appellee. To support its contention of contributory negligence, Counsel for Appellant submits only that Appellee, weighing an alleged 256 pounds would have been the last passenger to have been thrown from her seat if she had been seated in a normal position and not guilty of contributory negligence. The conclusion and arguments relied on by Counsel for Appellant are not supported by the facts established by the testimony of all witnesses who were present at the time of the accident in question. Appellee was seated in a normal position, facing toward the front of the bus with her feet on the floor (Tr. 35, 142, 143, 138, 139). There was no guard rail in front of the seat occupied by Appellee (Tr. 56, 57, 58, 159). Occupants of other seats were not thrown from their seats when the accident occurred since the backs of seats in front of them provided a guard. There was sufficient evidence to sustain the Court's finding that Appellant's

driver was negligent and that Appellee was not negligent.

ANSWER TO ARGUMENT ON SPECIFICATIONS OF ERROR Nos. 8, 9, AND 10

SUMMARY

The trial of this cause was completed on January 9th, 1951, and the Court's findings of fact were signed and lodged on February 2nd, 1951. The parties hereto were afforded a fair trial and ample opportunity to be heard. Counsel argued the facts and the law of the case, both orally and in writing. Appellee proved her case by a preponderance of the evidence, and the Court's findings were amply sustained thereby. With expert testimony available as to Appellee's physical condition, the Court properly excluded written report as to Appellee's general educational qualifications by one who admittedly was not a medical expert. There was no showing of abuse of the Court's discretion.

1. The decision of the Court upon the facts was not made until the findings of fact were signed and filed on February 2nd, 1951. As the record herein reflects, Counsel did argue the case, both during and upon conclusion of presentation (Tr. 166, 167, 168, 169, 170). Pursuant to arguments of Counsel the Court agreed with Counsel to permit, and pur-

suant to this directed, that Counsel prepare and file memoranda. Counsel, in the interval between the trial and February 2nd, did prepare and file briefs setting forth authorities and their respective arguments as to the facts and law. If Counsel for Appellant desired to more fully argue the facts they might have done so in the briefs submitted, or, if they entertained any misgivings as to whether it would have been permissible for them to do so, they should have at least requested permission, and, if they desired to further orally argue the facts, they could and should have moved the Court for leave to that end. If there were argument germane to the issues herein which were not presented to the Court by Counsel upon conclusion of presentation of evidence it could only have been due to the fact that Counsel was not then cognizant of them or was not prepared to present them, and not due to any action on the part of the Court in preventing them from being made. The fairness of the Court in assuring Counsel every opportunity to be heard is best evidence by the fact that the suggestion that additional time be allowed Counsel in which to prepare briefs originated with the Court. The authorities cited by Counsel for Appellant in its brief are submitted on the assumption that a reasonable opportunity to be heard was not afforded, and since this assumption is clearly

refuted by the record and the fact herein, the cases cited are not applicable, however they might otherwise be distinguishable.

2. Previous references herein to the evidence and to the record clearly reflect that the Appellee established her case by a preponderance of the evidence, and that the evidence is sufficient to sustain the trial Court's findings of fact.

3. Counsel for Appellant offered testimony by Mr. Harold R. Barton as to Appellee's physical condition. This testimony reflected only the most casual and limited opportunity on the part of this witness to observe Appellee's physical condition, and this a number of years after the accident. The witness was in no way qualified as an expert medical witness, or as having in fact examined the Appellee. Under the obvious pretext of seeking to confirm and strengthen Mr. Barton's testimony as to Appellee's physical condition by something in writing, Counsel sought to impugn Appellee's general educational qualifications as a teacher by introducing a written report allegedly made by the witness in 1949 and pertaining to such qualifications. The Court properly exercised its discretion in refusing to admit the questioned document. There is no showing that the Court abused its discretion herein.

CONCLUSION

Appellee has established herein that the question raised by Appellant's Specifications of Error should be answered as follows:

1. In this action, instituted by Appellee against Appellant under the provisions of the Federal Tort Claims Act, within the time specified in said Act, the statute of limitations of the State of Washington, Sections 155 and 159, Remington's Revised Statutes, is not applicable.

2. In this action, if the statute of limitation of the State of Washington, *supra*, were applicable, it still must be pleaded as an affirmative defense, and not having done so, Appellant cannot assert said statute as a defense to recovery by Appellee herein upon conclusion of the trial of the case to the trial Court, or on appeal.

3. Appellee's action was commenced within the period of time prescribed by the Federal Tort Claims Act, as amended, *supra*, which created the right of action, and her actions did not in any way prejudice the position of Appellant, therefore Appellee is not guilty of laches.

4. Laches, in an appropriate case, is an affirmative defense, and must be pleaded as such. Where,

as here, it is not, it cannot be asserted as a bar to recovery upon conclusion of the trial of a case, or on appeal.

5. The United States performs a duty to its armed forces when it affords recreation. Where, as here, in performing such duty it provides transportation to Appellee, and through negligence of its agent while said agent is acting within the scope of his authority, she is injured, said Appellee is not a guest or licensee within the meaning of Section 6360-121, Remington's Revised Statutes of the State of Washington, and said Appellee is not thereby barred from recovery against Appellant herein.

6. The evidence is sufficient to sustain the Court's finding that Appellee is entitled to \$250.00 special damages.

7. The evidence is sufficient to sustain the Court's finding that Appellee is entitled to \$7500.00 general damages.

8. The evidence is sufficient to sustain the Court's finding that Appellant's driver was negligent.

9. The evidence is sufficient to sustain the Court's finding that Appellee was not negligent.

10. Appellant herein was accorded a fair trial and the right to be heard.

11. The evidence is sufficient to sustain the Court's findings of fact.

12. There is no showing of an abuse of its discretion by the Court. . .

Appellee respectfully submits that the judgment of the Court herein should be affirmed.

J. B. PENNINGTON,
Attorney for Appellee

WILLIAM A. GRIFFIN
Attorney for Appellee

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

VS.

ESTHER WESTFALL
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
of Counsel for Appellant

KENNETH J. SELANDER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

No. 12966

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ESTHER WESTFALL
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

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1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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IN THE
United States
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UNITED STATES OF AMERICA,
Appellant,

vs.

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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

REPLY BRIEF OF APPELLANT

**REPLY OF APPELLEE'S ARGUMENT ON
SPECIFICATIONS OF ERROR Nos. 1 AND 2**

The appellee would have the court believe that there was nothing in the pleadings to raise the defenses of the statute of limitations and latches. It will be noted in paragraph IX of the plaintiff's complaint that there is an allegation as follows:

“That the negligent and wrongful acts and omissions of the defendant through its agent and employee as aforesaid were contrary to the laws of the State of Washington and the ordinances of the City of Tacoma, in general, and of the parts thereof which are hereinabove set forth in particular, and the same were done under circumstances where the defendant, if a private person, would have been liable to the plaintiff for the injuries and damages proximately resulting therefrom.” (Emphasis supplied).

Paragraph IX of the complaint was denied in paragraph IX of the Answer which denies each and every allegation in paragraph IX of the complaint.

The ultimate fact pleaded in the above quoted paragraph from the complaint is that under the laws of the State of Washington the United States would be liable if it were a private person, and since this allegation is denied all of the issues of law and fact which would show that a private person would not be liable under the laws of the State of Washington are at issue. By making such an allegation the appellee anticipated the appellant's defense. When such an allegation is denied the defense thus raised is at issue. On pages 310 and 311 of 71 Corpus Juris Secundum the following will be found:

“Matters subject to denial. The material facts alleged by plaintiff as constituting his cause of action may be denied. Facts not stated should not be denied, but a pleading is deemed to allege

what may be implied from the allegations therein by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred. Immaterial or collateral matters need not be denied. *Issue may be taken on a defense anticipated by plaintiff in his complaint.*" (Emphasis supplied)

It would be a useless gesture for the appellant to reallege in its answer the ultimate fact, that the United States would not be liable if it were a private person under the laws of the State of Washington. On page 251 of Volume 71 Corpus Juris Secundum the following will be found:

"Since the office of a plea is to set up facts which would otherwise not be apparent to the court, as discussed supra § 99, the plea or answer must set up matters not apparent from the declaration or complaint, *but it is not necessary to reallege the facts stated in the complaint.*" (Emphasis supplied)

If the appellee was not prepared to meet the issue on whether or not the appellant would be liable under the laws of the State of Washington, the appellee should not have set forth the allegations contained in paragraph IX of her complaint. However, the allegations thus being made and denied, the issues are raised by the pleadings.

REPLY OF APPELLEE'S ARGUMENT ON
SPECIFICATION OF ERROR No. 3

The appellee would have the court believe that she and the other members of her group were making this trip under some sort of contractual obligation wherein the transportation was compensation for their services. There is not one iota of evidence in the entire record which would in any way intimate that there was any sort of contractual obligation on the part of anyone. Every person in the appellee's group made the trip solely for their own pleasure or as a chaperon. On page 53 of the transcript the appellee herself states that no one was being paid for making the trip and that the group was taking the trip voluntarily. On page 54 of the transcript the appellee advises the court that she was one of the chaperons. On page 55 of the transcript the appellee herself further advises that the members of her group enjoyed making such trips and that there was no compulsion on the part of anyone to make such trip, and further, that anyone could have refused to go. On page 56 of the transcript the appellee further advises that the Army personnel would serve refreshments to the members of the group. On page 64 of the transcript Mrs. Troxell, another member of the appellee's group, stated that she enjoyed taking such trips and that they were entirely voluntary

and that she went voluntarily because of such pleasure and enjoyment. On page 66 of the transcript, Mrs. Bruck, another adult accompanying the appellee's group, stated that she went along as a chaperon. On page 69 of the transcript Mrs. E. T. Holloway, another adult accompanying the group, stated that it was just a pleasure trip. Certainly there is nothing in the statements of the witnesses which in any way indicates that there was any thought of compensation for their services or that their services were in payment for their transportation.

The appellee would have the court believe that because the personnel at Fort Lewis were in uniform that any enjoyment or recreation on their behalf was a commercial enterprise of the United States of America. The situation here presented is no different from that of any individual who might invite a group of his friends to come to his house for a party, sending his own chauffeur after them. Here we have a group of young men in the Army and away from home where they have no resources of their own to transport their friends to places of social entertainment. The Army authorities permitted the use of government-owned transportation for these purposes.

Undoubtedly everyone is entitled to and must have some recreation in his life. If a private indi-

vidual invited a guest to his house for a party, that individual is undoubtedly deriving some benefit therefrom by way of recreation. However, it would be absurd to state that such was a benefit to the private individual in a substantial or material or business sense.

The Army personnel here involved are in exactly the same position as a private individual. The fact that the military personnel are human beings and enjoy social contact with other people does not turn such enjoyment into a commercial enterprise. The fact a private individual used the same vehicle that he uses in his business for transporting guests to his house for a party, does not render such transportation a business enterprise or in any way compensate the owner of the vehicle in a substantial or material or business sense. The carriage is gratuitous only.

The appellee would further have the court believe that the transportation was furnished by the military personnel in expectation of some material benefit from the appellee and other persons in her group. The fallacy in this reasoning lies in the fact that no one in the appellee's group was under any obligation to make the trip or perform any services whatsoever after having received the transportation.

Every person in the appellee's group made the trip voluntarily and for his own pleasure. The only possible relationship between the Army personnel and the appellee is that of host-guest.

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 4

The appellee would have the court believe that somehow or another she still owns part of the claim for the services of Dr. Seering. As stated in the following quotation from *United States v. Aetna Surety Co.*, 338 U.S. 366 at page 381, in cases of partial subrogation both the insured and the insurer must be named as parties plaintiff under Rule 17(a) of the Federal Rules of Civil Procedure.

"In cases of partial subrogation the question arises whether suit may be brought by the insurer alone, whether suit must be brought in the name of the insured for his own use and for the use of the insurance company, or whether all parties in interest must join in the action. Under the common-law practice rights acquired by subrogation could be enforced in an action at law only in the name of the insured to the insurer's use, *Hall & Long v Railroad Companies*, 13 Wall. 367 (1872); *United States v. American Tobacco Co.*, *supra*, as was also true of suits on assignments, *Glenn v. Marbury*, 145 U.S. 499 (1892). Mr. Justice Stone characterized this rule as 'a vestige of the common law's reluctance to admit that a chose in action may be assigned, (which) is today but a formality which has been widely

abolished by legislation.' *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 540 (1933). Under the Federal Rules, the 'use' practice is obviously unnecessary, as has long been true in equity, *Garrison v. Memphis Insurance Co.*, 19 How. 312 (1857), and admiralty, *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.*, 129, U.S. 397, 462 (1889). Rule 17(a) was taken almost verbatim from Equity Rule 37. No reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer 'own' portions of the substantive right and should appear in the litigation in their own names."

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 5

The appellee would have the court believe that the award of general damages in the sum of \$7500.00 was justified on the basis of loss of earnings. The record clearly shows that instead of the appellee's earnings being decreased \$50.00 per month the earnings have been virtually doubled since the date of the accident. The defendant's earnings for the school year for 1945-46 were set out in defendant's exhibit "F" on pages 101 and 102 of the transcript. This record shows that during the nine month period the appellee earned a salary of \$800.50. This averaged approximately \$90.00 per month. Thereafter, the appellee earned \$180.00 per month, or double her previous earnings, while employed at Boeing Aircraft

Company. Thereafter, the appellee earned approximately \$150.00 per month as a saleslady for Stanley Home Products. Thereafter, the appellee again worked as a school teacher on Vashon Island earning \$212.00 per month. Thereafter the appellee has worked as a saleslady for Real Silk Hosiery earning something in excess of \$150.00 per month. With such increase of earnings there can be no justification for the award of \$7500.00 for a sprained ankle and a sprained back on basis of loss of earnings. As pointed out in the appellant's opening brief, the appellee's troubles stemmed from overweight and poor posture rather than any injuries caused by appellant.

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATIONS OF ERROR Nos. 6 AND 7

It will be noted that the appellee refuses to discuss or argue the points raised in appellant's brief on specifications of error Nos. 6 and 7. The obvious reason for such refusal lies in the fact that there is no answer to the points raised by the appellant. The physical facts, as stated by the appellee herself clearly negative any negligence on behalf of the appellant.

The appellee would have the court believe that Mr. Yingling, the driver of appellant's bus, was not the true driver of such bus. Mr. Yingling definitely identified Mrs. Westfall as the person involved in

this accident. (Tr. 117 and 118) It will be noted that in both the complaint and the appellee's testimony the appellee scrupulously avoids naming or identifying the driver of the bus. (Tr. 9 and 34) It would thus appear that the appellee was placing herself in a position where she could deny the appellant's testimony as to the driver of the bus no matter who was presented as the driver of the bus. The appellee scrupulously avoided bringing this action until she had lost over 75 pounds in weight, thus materially changing her physical appearance and making it difficult for any one to recognize her.

Mr. Yingling squarely contradicted the testimony of the appellee. Likewise, Miss Beverly Bruck, daughter of one of the appellee's witnesses, squarely contradicted the appellee. Both of these witnesses stated that the appellee was sitting sideways in her seat talking to persons in the rear of the bus. Had the appellee actually been frightened by the manner in which the bus was being driven she would have been facing towards the front anticipating danger.

The appellee further states on page 38 of her brief:

"Occupants of other seats were not thrown from their seats when the accident occurred since the backs of seats in front of them provided a guard."

There is not one iota of evidence that anyone was thrown against the back of the seat in front of them.

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 8

The appellee would have the court believe that the trial judge deliberated quite some time before rendering a decision. As the record shows (Tr. 165) immediately upon both sides resting, the court stated:

"I am persuaded that the plaintiff has made out a case. The court will find negligence on the part of the driver of the bus proximately causing injuries to the plaintiff and that the plaintiff, herself, was free of contributory negligence."

The court thus made this finding without any argument whatever from counsel on either side. There was no opportunity whatever for the appellant to make an argument.

The appellee now contends that the appellant should have requested leave to make an oral argument. It would certainly be ridiculous to require counsel to spring to their feet immediately upon the conclusion of the evidence and ask leave of the court to make an oral argument. It is a duty of the court to afford counsel that opportunity before a decision is rendered. Once a decision has been rendered an oral argument is a useless gesture. Once the trial

judge has orally and publicly committed himself as to his findings he has placed himself in a position where it would be highly embarrassing to admit that he was wrong after hearing argument from the losing side. To do so would subject the trial judge to severe criticism for vacillating.

Despite appellee's argument to the contrary, the trial court did not assure counsel for appellant every opportunity to be heard, but on the contrary, merely gave counsel for appellant an opportunity to file a written memorandum, and this was done only after the court had announced its findings of fact and it was made known to the court that there were some laws that the court had obviously overlooked. The trial judge then condescended to allow a "short memorandum" to be filed setting forth the authorities on the guest statute of the State of Washington. This was by no means an opportunity to make an oral argument on the entire case, a substantial right to which the appellant is entitled.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 9

It is to be noted that the appellee refuses to make any argument whatever with regards to appellant's specification of error No. 9. The obvious reason for this is that the trial judge was clearly in error.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 10

The appellee would have the court believe that the appellant was seeking to elicit testimony from Mr. Barton which would impugn the appellee's general educational qualifications. Although the appellee may not have had proper general educational qualifications to enable her to hold a job as a teacher, the appellant was not seeking to elicit such facts. As clearly shown by the record (Tr. 94) the appellant was seeking to show a written report revealing the appellee's lack of physical impairment made by the witness at a time when his knowledge of such facts was fresh in his memory.

CONCLUSION

The appellant having completely answered every argument of the appellee set forth in her brief, respectfully requests this court to remand this case to the District Court with instructions to enter judgment for the appellant.

Respectfully submitted

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
of Counsel for Appellant

KENNETH J. SELANDER
Assistant United States Attorney

No. 12967

United States
Court of Appeals
for the Ninth Circuit.

LUCY K. WARD, Next Friend of Hattie Kulamanu
Ward and LUCY K. WARD and KATHLEEN
WARD,

Appellants,

vs.

LANIE W. BOOTH and MELLIE E. HUSTACE
and HAWAIIAN TRUST COMPANY,
LIMITED, in Its Corporate Capacity and as
Guardian of the Estate of Hattie Kulamanu
Ward,

Appellees.

Transcript of Record

Appeal from the Supreme Court of the
Territory of Hawaii

No. 12967

United States
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Ward and LUCY K. WARD and KATHLEEN
WARD,

Appellants,

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LANIE W. BOOTH and MELLIE E. HUSTACE
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Transcript of Record

Appeal from the Supreme Court of the
Territory of Hawaii

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Lani W. Booth, Mellie
E. Hustace, and Hawaiian Trust Co.,
Ltd., appellees. [1*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

In the Supreme Court of the Territory of Hawaii
No. 2761

Appeal from the Circuit Court, First Judicial Circuit, the Honorable Albert M. Cristy, at Chambers in Probate Proceedings. Probate No. 15530.

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU WARD,

An Incompetent.

In the Supreme Court of the Territory of Hawaii
No. 2762

Error to the Circuit Court, First Judicial Circuit, the Honorable Albert M. Cristy, at Chambers in Probate Proceedings. Probate No. 15530.

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU WARD,

An Incompetent.

NOTICE OF APPEAL

Notice is hereby given that the appellants in the above-entitled causes, Lucy K. Ward, next friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the decision of the Supreme Court of the Territory of Hawaii dated February 2, 1951, rehearing denied April 18, 1951, and orders therein dated May 5, 1951, affirming the orders of the Circuit [4] Court

of the First Judicial Circuit, Territory of Hawaii, the Honorable Albert M. Cristy, at chambers in probate proceedings, presiding, finding Hattie Kulamanu Ward incompetent to manage her affairs, and appointing as her guardian the Hawaiian Trust Company, Limited, and the order vacating the appointment of Lucy K. Ward, next friend of Hattie Kulamanu Ward, dissolving a temporary restraining order, and denying, without hearing on the merits, the motion of said appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, to vacate the order appointing Hawaiian Trust Company, Ltd., as guardian of the estate of Hattie Kulamanu Ward, or to remove said guardian and to hold further hearings.

Dated: Honolulu, T. H., May 17th, 1951.

BOUSLOG & SYMONDS,

By /s/ HARRIET BOUSLOG,

Attorneys for Appellants.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., May 17, 1951. [5]

In the Supreme Court of the Territory of Hawaii
[Title of Cause.]

Nos. 2761 and 2762

PETITION FOR APPEAL

Come now Lucy K. Ward, next friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen

Ward, appellant, by Bouslog & Symonds, their attorneys, and deeming themselves aggrieved by the final opinion and decision of this Court made and entered in the above-entitled causes on the 2nd day of February, 1951, the opinion and decision denying appellants' Petition for Rehearing on April 18, 1951, and the judgment on writ of error [7] and decree on appeal made and entered on the 5th day of May, 1951, pray that an appeal may be allowed from said opinions and decisions and judgment on writ of error and decree on appeal, to the United States Court of Appeals for the Ninth Circuit under and according to the laws of the United States; that an order be made fixing the amount of security that said appellants shall give and that the clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Court of Appeals for the Ninth Circuit a transcript of the record proceedings, documentary exhibits and papers duly authenticated.

In connection with this appeal, appellants herewith present their assignments of error and state that the writ of error and appeal were prosecuted to this Court from an order of the Honorable Albert M. Cristy, at Chambers in Probate, appointing the Hawaiian Trust Company, Limited, guardian of the estate of Hattie Kulamanu Ward, in which proceedings appellant Lucy K. Ward and Kathleen Ward, sisters of the alleged incompetent, intervened and opposed the appointment of the said guardian and from an order vacating the appointment of Lucy K. Ward, next friend of Hattie Kula-

manu Ward, dissolving a temporary restraining order against the Hawaiian Trust Company and denying, without hearing on the merits, the motion of Lucy K. Ward, as next friend of Hattie Kulamanu Ward, to vacate the appointment of the guardian, or to remove the guardian on the ground of unsuitability.

Appellants further state, insofar as the appeal and writ of error is prosecuted by appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, for and on behalf of said Hattie Kulamanu [8] Ward, that the property and estate of said Hattie Kulamanu Ward is far in excess of the sum of \$5,000.00, being of the value of \$1,000,000.00 or more, and the right of said Hattie Kulamanu Ward to manage her property and estate or to select management of her own choosing is therefore in excess of \$5,000.00.

Appellants further state that insofar as the writ of error is prosecuted by appellants Lucy K. Ward and Kathleen Ward, sisters of Hattie Kulamanu Ward, on their own behalf, each of them, together with Hattie Kulamanu Ward, the alleged incompetent, is a joint owner with rights of supervisorship of a one-third undivided interest in large parcels of real estate in the City and County of Honolulu, the value of which is far in excess of \$5,000.00, and is of a value in excess of \$1,000,000.00.

That the right of appellants Lucy K. Ward and Kathleen Ward to manage this joint property without interference and consultation and consent by the said guardian, the officers and agents of which

are unacceptable to and antagonistic to them, is in excess of \$5,000.00.

Appellants further state that a portion of the assets of the estate of Hattie Kulamanu Ward consists of stock in a family corporation, Victoria Ward, Limited; that there are issued and outstanding by said corporation 5,200 shares of stock; that these stocks are owned as follows:

Hattie Kulamanu Ward,	
daughter of Victoria Ward..	1,230 shares
Lucy K. Ward, daughter of	
Victoria Ward.....	1,222 shares
Kathleen Ward, daughter of	
Victoria Ward.....	1,222 shares
Cenric Nourse Wodehouse, son	
of Mae Wodehouse, deceased,	
daughter of Victoria Ward..	642 shares
Lani W. Booth, daughter of	
Victoria Ward.....	874 shares
Mellie E. Hustace, daughter	
of Victoria Ward.....	10 shares

That the stock of appellants Lucy K. Ward and Kathleen Ward in said corporation is in excess of \$5,000.00, and is in the approximate amount of \$400,000.00; that prior to appointment of said guardian, appellant Kathleen Ward was the president of said family corporation, and appellant Lucy K. Ward was the treasurer of said family corporation, and as said officers were active managers of said corporation and received as said officers, for their services, salaries in excess of \$5,000.00 per

year; that said guardian has used its control over the shares of stock of said incompetent, in combination with Lani W. Booth and Mellie E. Hustace, petitioners for the appointment of said Hawaiian Trust Company, Limited, and Cenric Nourse Wodehouse, to oust appellants Lucy K. Ward and Kathleen Ward as managers of said family corporation, has placed said corporation under management antagonistic to and unacceptable to said appellants; that the right of appellants to have said corporation managed by an impartial management not antagonistic to and unacceptable to them is a valuable property right worth in excess of \$5,000.00.

Appellants further state that these causes involve the Constitution of the United States, the Hawaiian Organic Act, [10] and authority exercised thereunder, in that Sections 12508 and 12509 of the Revised Laws of Hawaii, 1945, as construed and applied in these causes, deny to appellants due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and Section 12509, Revised Laws of Hawaii, 1945, on its face and as construed and applied, is in contravention of the Fifth and Seventh Amendments to the Constitution of the United States in that it does not provide for or authorize due process of law by providing for a trial by jury of the issue of insanity.

Appellants further state that a denial of due process of law under the Fifth Amendment to the Constitution is involved in that the Honorable Albert M. Cristy manifested such bias and prejudice

against appellant Lucy K. Ward that she was denied a hearing before a fair and impartial tribunal.

Dated: Honolulu, T. H., this 17th day of May, 1951.

BOUSLOG & SYMONDS,

By /s/ HARRIET BOUSLOG,

Attorneys for Appellants Lucy K. Ward, as next friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward.

Territory of Hawaii,
City and County of Honolulu—ss.

Harriet Bouslog, being first duly sworn, deposes and says that she is one of the attorneys for the appellants named in the foregoing Petition for Appeal, that she has read the [11] foregoing Petition, knows the contents thereof, and that the matters and things therein set forth are true of her own knowledge.

HARRIET BOUSLOG.

Subscribed and sworn to before me this 17th day of May, 1951.

[Seal] /s/ J. D. MARQUES,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission Expires July 15, 1953.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., May 17, 1951. [12]

In the Supreme Court of the Territory of Hawaii

Nos. 2761 and 2762

[Title of Cause.]

ASSIGNMENT OF ERRORS

Assignment No. 1

The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court," erred in making and entering its Opinion and Decision on the 2nd day of February, 1951, in the above-entitled Court and causes.

Assignment No. 2

The Court erred in making and entering its Opinion and Decision denying the Petition for Re-hearing on the 18th day of [14] April, 1951, in the above-entitled Court and cause.

Assignment No. 3

The Court erred in making and entering its Judgment on Writ of Error and Decree on Appeal, on the 5th day of May, 1951, in the above-entitled Court and cause.

Assignment No. 4

The Court erred in its conclusion that the Fifth and Seventh Amendments to the Constitution of the United States do not guarantee to persons resident in the Territory of Hawaii, including Hattie Kulanu Ward, who here appears by her next friend Lucy K. Ward, the right to a jury trial on the issue of sanity, and hence that Section 12509 of

Revised Laws of Hawaii is valid and not in contravention of these Amendments.

Assignment No. 5

The Court erred in making and entering its Judgment on Writ of Error and Decree on Appeal in that Sections 12508 and 12509, Revised Laws of Hawaii, 1945, as construed and applied in these causes, deny appellants due process of law in violation of the Fifth Amendment to the Constitution of the United States in the following respects:

a. As construed and applied, these sections permit a finding of incompetency without a determination or finding of notice as required by statute.

b. As construed and applied, these sections permit the appointment of a guardian ad litem for an adult alleged to be incompetent, without notice to the alleged incompetent.

c. As construed and applied, these sections permit the [15] appointment of a guardian which has or may have conflicting interest.

d. As construed and applied, these sections permit appointment as guardian of nominee of two petitioning sisters, over the opposition of two intervening sisters with equal interests and equal rights.

e. As construed and applied, these sections authorize appointment of guardian on petition of some relatives without allowance of a full and fair hearing to intervening relatives, with equal interests and rights, who opposed petition in respect to motives of petitioners in seeking appoint-

ment of guardian, and in that by such ruling intervenors were foreclosed from having a full and fair hearing by ruling of Court.

f. As construed and applied, these sections deny due process and full and fair hearing to intervenors who have equal status with petitioners for guardianship, in that Court ruled intervenors had under statute no standing to object, and had as a matter of law conflicting interest when no such conflict existed in fact or law, and Court's ruling precluded intervenors from showing absence of conflict.

g. In that these sections, as construed and applied, permit the appointment of a guardian without a finding of insanity.

Assignment No. 6

The Court erred in making and entering its Judgment on Writ of Error affirming the order appointing the Hawaiian Trust Company, Ltd., guardian of the Estate of Hattie Kulamanu Ward, and making and entering the Decree on Appeal affirming the order vacating the appointment of Lucy K. Ward, next friend of Hattie [16] Kulamanu Ward, dissolving the temporary restraining order and denying the motion to set aside the order appointing the guardian or to remove the guardian, in that there is error and abuse of discretion which amounts to a denial to appellants of due process of law and a denial of a full and fair hearing under the showing made that:

1. The alleged incompetent had been examined by a reputable alienist, who found her competent to select the person she desired to manage her affairs.

2. The motives of the two petitioning sisters, who sought to have Hattie Kulamanu Ward declared incompetent, were suspect for reasons fully set forth in the verified motion.

3. That the Hawaiian Trust Company had conflicting interests which made it an unsuitable guardian.

4. The alleged incompetent's property was and had been properly cared for by a person chosen by her, she having, according to proffered evidence, competence to select the person she wished to assist her.

5. The appointment of the Hawaiian Trust Company as guardian would change the management of the family corporation, and that by so appointing the nominee of the two petitioning sisters, the Hawaiian Trust Company, the Court was taking sides in a family dispute without any knowledge of the facts or merits of the respective sides in said dispute, and was not only depriving the alleged incompetent of the right to manage her property and estate or select whom she desired to manage it, but was also effectively robbing the two sisters who opposed the petition—because of the unique circumstances shown in the petition—of the right to manage their own property, or to have it managed

by an impartial person or trust company not antagonistic [17] to them and to their interests, and not committed to a course of action against their wishes.

Assignment No. 7

The Court erred in refusing to consider on the merits certain assignments of error on the ground that they were not made the subject of exceptions, it being settled law in the Territory that in proceedings of an equitable nature, errors apparent on the face of the record may be corrected by writ of error regardless of the taking of exceptions.

Assignment No. 8

The Court erred in its conclusion that Section 12509 does not afford appellants, as a matter of right, a hearing on the merits of the motion to remove the Hawaiian Company, Ltd., as guardian on the ground of unsuitability.

Assignment No. 9

The Court erred in its conclusion that the manifest bias and prejudice shown by the circuit judge against appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, did not constitute a denial of due process of law on motion to vacate the order appointing the guardian, or to remove the guardian.

Wherefore, appellants pray that the Opinion and Decision of the Supreme Court of the Territory of Hawaii, entered in the above-entitled causes on the

2nd day of February, 1951, denying rehearing on the 18th day of April, 1951, and the Judgment on Writ of Error and Decree on Appeal of the said Supreme Court entered in the above-entitled cause on the 5th day of May, 1951, [18] be reversed and for such other and further relief as may be proper.

Dated: Honolulu, T. H., this 17th day of May, 1951.

BOUSLOG & SYMONDS,

By /s/ HARRIET BOUSLOG,

Attorneys for Appellants Lucy K. Ward, as next friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., May 17, 1951. [19]

In the Supreme Court of the Territory of Hawaii

Nos. 2761 and 2762

[Title of Cause.]

ORDER ALLOWING APPEAL AND
FIXING AMOUNT OF BOND

Upon reading and filing the verified petition of appellants Lucy K. Ward, next friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward, by Harriet Bouslog of Bouslog & Symonds, their attorneys, in which they pray that an appeal may be allowed them from the final opinion and

decision of this Court, made and entered in the above-entitled causes on the 2nd day of February, 1951, and denying rehearing on the 18th [21] day of April, 1951, and judgment on writ of error and decree on appeal, made and entered on the 5th day of May, 1951, in the above-entitled causes to the United States Court of Appeals for the Ninth Circuit, and upon petitioners' filing an assignment of errors together with said petition for appeal, together with a bond for costs in the sum of Two Hundred Fifty Dollars (\$250.00).

It Is Hereby Ordered that said appeal be and it is hereby allowed and that the bond for costs in the sum of Two Hundred Fifty Dollars (\$250.00) filed herein be and it is hereby approved.

Dated: Honolulu, T. H., this 17th day of May, 1951.

[Seal] /s/ LOUIS LeBARON,
Justice.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., May 17, 1951. [22]

In the Supreme Court of the Territory of Hawaii

Nos. 2761 and 2762

[Title of Cause.]

BOND ON APPEAL

Know all men by these presents, that Lucy K. Ward, next friend of Hattie Hulamanu Ward, and Lucy K. Ward and Kathleen Ward, as principals, and United States Fidelity and Guaranty Company, a corporation duly licensed to carry on business in the Territory of Hawaii, as surety, are held and firmly bound unto the appellee in the above-entitled causes, in the sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which well and truly to be made, we bind ourselves and [24] our successors and assigns, jointly and severally, and firmly by these presents.

The condition of this obligation is such that:

Whereas, the above bounden principals have filed their petition for appeal from the Supreme Court of the Territory of Hawaii to the United States Court of Appeals for the Ninth Circuit to reverse the final opinion and decision of this Court made and entered in the above-entitled causes on the 2nd day of February, 1951, and denying rehearing on the 18th day of April, 1951, and judgment on writ of error and decree on appeal made and entered on the 5th day of May, 1951.

Now, Therefore, if the said principals shall prosecute their appeal with effect and answer all costs if they fail to sustain said appeal, then this

obligation shall be void, otherwise it remains in full force and effect.

Sealed with our seal, and dated this 17th day of May, 1951.

/s/ LUCY K. WARD,
Next Friend of Hattie
Kulamanu Ward;

/s/ LUCY K. WARD, and
/s/ KATHLEEN WARD,

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

[Seal] By /s/ JOHN F. HRON,
Its Attorney in Fact. [25]

The foregoing bond is hereby approved as to form, amount and sufficiency of surety.

.....,
Justice.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 17th day of May, 1951, before me appeared Lucy K. Ward and Kathleen Ward, to me personally known, who being by me duly sworn, did say that they are the principals named in the foregoing Bond on Appeal, and acknowledged said instrument as their free act and deed.

[Seal] /s/ A. F. MARQUES,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1953.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 17th day of May, 1951, before me personally appeared John F. Hron, to me personally known, who being by me duly sworn did say that he is the Attorney-in-Fact of the United States Fidelity and Guaranty Company, duly appointed under Power of Attorney dated the 30th day of November, 1936, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed [26] and sealed on behalf of said corporation under the authority of its Board of Directors and said John F. Hron acknowledged said instrument to be the free act and deed of said corporation.

[Seal] /s/ WILLIAM B. STEVEN,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires May 6, 1952.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., May
17, 1951. [27]

In the Supreme Court of the Territory of Hawaii

Nos. 2761 and 2762

[Title of Cause.]

CITATION

To: Lani W. Booth and Mellie E. Hustace, and Hawaiian Trust Company, Limited, in its corporate capacity, and as Guardian of the Estate of Hattie Kulamanu Ward:

You, and each of you, are hereby cited and admonished to be and appear before the United States Court of Appeals for the Ninth Circuit, at the Court of San Francisco, State of California, within forty days from the date of this citation, pursuant to an appeal duly allowed by the Supreme Court of the Territory of Hawaii on the 17th day of May, 1951, in the above-entitled [33] causes wherein Lucy K. Ward, next friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward are appellants, and you are appellees, to show cause, if any, why the final opinion and decision of this Court, made and entered on the 2nd day of February, 1951, rehearing denied on the 18th day of April, 1951, and the judgment on writ of error and decree on appeal made and entered on the 5th day of May, 1951, should not be corrected and why speedy justice should not be done to the parties in their behalf.

Witness the Honorable Louis LeBaron, Acting

Chief Justice of the Supreme Court of the Territory of Hawaii, this 17th day of May, 1951.

[Seal] /s/ LOUIS LeBARON,
Acting Chief Justice of the Supreme Court of the
Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., May
17, 1951. [34]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

At Chambers

In Probate

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU WARD,

An Incompetent Person.

PETITION FOR APPOINTMENT
OF GUARDIAN

To the Honorable Presiding Judge in and of the
Above-Entitled Court:

Come now Lani W. Booth and Mellie E. Hustace,
residing in the City and County of Honolulu, Territory of Hawaii, and respectfully show as follows:

1.

That they are sisters of the above-mentioned

Hattie Kulamanu Ward, an incompetent person, residing in Honolulu, Hawaii;

2.

That said Hattie Kulamanu Ward is 79 years of age and by reason of advanced age and physical and mental infirmities has become incompetent to understand business affairs or to care for her property and is non compos; that she is the owner of extensive property, real and personal, situated in the Territory of Hawaii, of a value in excess of \$500,000; [39]

3.

That at the present time, due to the incompetence of said Hattie Kulamanu Ward, her business affairs are being conducted by her sister, Lucy K. Ward, as attorney-in-fact, and there is or may be a conflict of interests between Hattie Kulamanu Ward and her attorney-in-fact, Lucy K. Ward;

4.

That it is necessary that a suitable guardian be appointed to care for the property of said incompetent, and that Hawaiian Trust Company, Limited, a corporation organized under the laws of the Territory of Hawaii and authorized to act as a fiduciary, is a suitable and proper person to be appointed as such guardian and has consented to act as such guardian.

Wherefore, petitioners pray that said Hawaiian Trust Company, Limited, be appointed guardian of the property of said Hattie Kulamanu Ward, and

petitioners further pray that an order be made and entered directing that notice of this petition and of the time and place of hearing same be given to the said Hattie Kulamanu Ward.

Dated: Honolulu, Hawaii, November 20th, 1948.

/s/ LANI W. BOOTH,

/s/ MELLIE E. HUSTACE,

Petitioners. [40]

Territory of Hawaii,
City and County of Honolulu—ss.

Lani W. Booth and Mellie E. Hustace, each for herself and not one for another, being first duly sworn, on oath deposes and says:

That she is a petitioner named in the foregoing petition; that she has read the said petition, knows the contents thereof, and that the same is true.

/s/ LANI W. BOOTH,

/s/ MELLIE E. HUSTACE.

Subscribed and sworn to before me this 20th day of November, 1948.

[Seal] /s/ JEAN M. WINSLEY,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 9, 1950. [41]

Officer's Return

Served the within Petition for Appointment of Guardian and Affidavit on Hattie Kulamanu Ward, an incompetent person, in the presence of Miss Kathleen Ward, a person who appeared to me to

be of sound mind, therein named in said Petition as an incompetent person, at 9:20 a.m., at 959 South King Street (Old Plantation), Honolulu, City and County of Honolulu, Territory of Hawaii, this 24th day of November, A.D. 1948, by delivering to her personally a true and attested copy thereof and at the same time showing her the original.

Dated: Honolulu, T. H., November 24th, 1948.

/s/ MOSES WRIGHT

KAULULAAU,

Chief Court Officer and Bailiff, First Circuit Court,
T. H. Certified true copy

[Endorsed]: Filed Circuit Court, T. H., November 23, 1948. [42]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

[Title of Cause.]

ORDER OF SERVICE OF PETITION

Upon reading and filing of the petition for the appointment of a guardian for Hattie Kulamanu Ward, and good cause appearing therefor,

It Is Hereby Ordered that a certified copy of said petition and of this order be served on the said Hattie Kulamanu Ward by the bailiff of this court or any police officer of the City and County of Honolulu;

It Is Further Ordered that the hearing of said

petition be had on the 14th day of Dec., 1948, in the courtroom of the undersigned judge of the above-entitled court in the Judiciary Building, Honolulu, Hawaii, at 1:30 o'clock p.m. of said day.

Dated: Honolulu, Hawaii, November 23, 1948.

[Seal] /s/ JOHN E. PARKS,
Judge of the Above-Entitled
Court.

Attest:

/s/ F. A. HONG,
Clerk. [44]

Officer's Return

Served the within Order on Hattie Kulamanu Ward, an incompetent person, in the presence of Miss Kathleen Ward, a person who appeared to me to be of sound mind, therein named as an incompetent person, at 9:20 a.m., at 959 South King Street (Old Plantation), Honolulu, City and County of Honolulu, Territory of Hawaii, this 24th day of November, A.D. 1948, by delivering to her personally a true and attested copy thereof and at the same time showing her the original.

Dated: Honolulu, T. H., November 24th, 1948.

/s/ MOSES WRIGHT
KAULULAAU,

Chief Court Officer and Bailiff, First Circuit
Court, T. H.

Certified true copy.

[Endorsed]: Filed Circuit Court, T. H., November 23, 1948. [45]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

[Title of Cause.]

ORDER

Good cause appearing therefor, It Is Hereby Ordered that J. Edward Collins, Esq., is hereby appointed guardian ad litem for Hattie Kalumanu Ward, pursuant to Section 12509, R.L.H. 1945, and

It Is Further Ordered that notice be given such guardian ad litem by the service of a copy of the petition for appointment of guardian and of this order.

Dated: Honolulu, Hawaii, December 16, 1948.

[Seal] /s/ WILLSON C. MOORE,
Judge of the Above-Entitled
Court.

Attest:

/s/ M. K. YOUNG.

[Endorsed]: Filed Circuit Court, T. H., December 17, 1948. [47]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

[Title of Cause.]

ORDER APPOINTING GUARDIAN

The petition of Lani W. Booth and Mellie E.

Hustace of the City and County of Honolulu, Territory of Hawaii, for the appointment of Hawaiian Trust Company, Limited, as the guardian of the Estate of Hattie Kalumanu Ward, an incompetent person, coming on regularly to be heard before me the 13th day of January, 1949, whence it appeared from examination that the said incompetent has no guardian legally appointed, that said incompetent is a resident of the aforesaid City and County of Honolulu and has an estate within the jurisdiction of this Court requiring the care and attention of a guardian, and that Hawaiian Trust Company, Limited, is a fit and proper person to be appointed as such guardian,

It Is Hereby Ordered that Hawaiian Trust Company, Limited, be and is hereby appointed guardian of the estate of said incompetent, and that Letters of Guardianship be issued to it upon giving an approved bond in the sum of \$10,000, conditioned in accordance with law.

Dated: Honolulu, Hawaii, this 14th day of January, 1949.

[Seal] /s/ A. M. CRISTY,
Presiding Judge.

Certified true copy.

[Endorsed]: Filed Circuit Court, T. H., January 14, 1949. [49]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

[Title of Cause.]

MOTION OF LUCY K. WARD FOR ORDER
APPOINTING NEXT OF FRIEND OF
HATTIE KULAMANU WARD

Comes now Lucy K. Ward, next of friend of Hattie Kalumanu Ward, and moves this Honorable Court for an Order appointing her as next of friend of Hattie Kulamanu Ward in the above-entitled proceedings, for the purpose of representing her in a motion to vacate an order appointing the Hawaiian Trust Company, Limited, Guardian of the Estate of Hattie Kulamanu Ward, or to remove said guardian, and for other relief necessary to protect the interests of said Hattie Kulamanu Ward and her estate and property.

This motion is based upon Movant's affidavit which is attached hereto and made a part hereof.

Dated: Honolulu, T. H., this 12th day of March,
A.D. 1949.

[Seal] /s/ LUCY K. WARD. [51]

AFFIDAVIT OF LUCY K. WARD

Territory of Hawaii,
City and County of Honolulu—ss.

Lucy K. Ward, being first duly sworn on oath, deposes and says: That she is the sister of Hattie

Kulamanu Ward and has for many years been her attorney-in-fact in the management of her affairs; that in order to protect said Hattie Kulamanu Ward and her estate and property, it is necessary to present to this court a motion to vacate the order appointing the Hawaiian Trust Company, Limited, guardian of the Estate of Hattie Kulamanu Ward, or to remove said guardian, and for other relief; that Hattie Kulamanu Ward has good grounds for said motion; that Hattie Kulamanu Ward is, because of age and physical condition of health, and the action of this court in adjudicating her incompetent, unable to represent herself in this matter, and it is necessary for a next of friend to be appointed for said Hattie Kulamanu [52] Ward for the purpose of bringing said motion for the removal of the Hawaiian Trust Company, Limited, as guardian of the Estate of Hattie Kulamanu Ward; that these proceedings being adversary to said prior appointed guardian, they cannot be prosecuted by said guardian.

Dated: Honolulu, T. H., this 12th day of March, A.D. 1949.

/s/ LUCY K. WARD.

Subscribed and sworn to before me this 12th day of March, 1949.

[Seal] /s/ EILEEN N. FUJIMOTO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires July 31, 1951. [53]

ORDER APPOINTING NEXT OF FRIEND

Upon the reading of the annexed motion and affidavit for an order for the appointment of next of friend, and it appearing that Hattie Kulamanu Ward is unable to represent herself in these proceedings, and that the proceedings to be filed are against the guardian of the Estate of Hattie Kulamanu Ward heretofore appointed, and that it is necessary that a proper person be appointed as next of friend for the purpose of bringing a motion for the vacation of the appointment or the removal of the Hawaiian Trust Company, Limited, as guardian of the Estate of Hattie Kulamanu Ward on behalf of said Hattie Kulamanu Ward;

It Is Hereby Ordered that Lucy K. Ward be and she is hereby appointed next of friend of said Hattie Kulamanu Ward for the purpose of making said motion to vacate and set aside the order appointing Hawaiian Trust Company, Limited, as guardian of the Estate of Hattie Kulamanu [54] Ward, or to remove said trustee.

Dated: Honolulu, T. H., this 12th day of March, A.D. 1949.

/s/ WILLSON C. MOORE,

Judge of the Above-Entitled
Court.

Certified true copy.

[Endorsed]: Filed Circuit Court, T. H., March 12, 1949. [55]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

[Title of Cause.]

MOTION OF LUCY K. WARD, SISTER, ATTORNEY-IN-FACT AND NEXT FRIEND OF HATTIE KULAMANU WARD, TO VACATE ORDER APPOINTING HAWAIIAN TRUST COMPANY, LIMITED, AS GUARDIAN OF THE ESTATE OF HATTIE KULAMANU WARD, OR TO REMOVE SAID GUARDIAN; TO HOLD FURTHER REHEARINGS RESPECTING THE ISSUES RAISED BY THE PETITION HEREIN; FOR AN ORDER TO SHOW CAUSE AGAINST LANI W. BOOTH, MELLIE E. HUSTACE AND THE HAWAIIAN TRUST COMPANY, LIMITED, AS GUARDIAN OF THE ESTATE OF HATTIE KULAMANU WARD, AND FOR A TEMPORARY RESTRAINING ORDER AGAINST THE HAWAIIAN TRUST COMPANY, LIMITED, AS GUARDIAN OF THE ESTATE OF HATTIE KULAMANU WARD, AND VERIFICATION THEREOF

MOTION

Comes now Lucy K. Ward, Movant, on behalf of Hattie Kulamanu Ward, and alleges:

I.

That she is a sister of Hattie Kulamanu Ward, and resides with her at 959 South King Street, Honolulu, City and County of Honolulu, Territory of Hawaii; that she has been for many years the attorney-in-fact acting in connection with the business affairs of Hattie Kulamanu Ward, and that she has on this day applied to the Court for permission to file this motion as next friend of Hattie Kulamanu Ward, who is, at the present time, unable to act in her own behalf; that she makes this motion on behalf of Hattie Kulamanu Ward, as her sister, attorney-in-fact or next of friend.

II.

That The Hawaiian Trust Company, Limited, is a banking corporation, organized and existing under the laws of the Territory of Hawaii, and having a principal place of [57] business in Honolulu, City and County of Honolulu, Territory of Hawaii.

III.

That Lani W. Booth and Mellie E. Hustace are sisters of Hattie Kulamanu Ward and of this Movant, who heretofore filed in this proceeding a petition for an adjudication that Hattie Kulamanu Ward is mentally incompetent to manage her business affairs and for the appointment of The Hawaiian Trust Company, Limited, as Guardian of her Estate.

IV.

That during all the times herein mentioned, Hattie Kulamanu Ward was and now is the owner of a

substantial estate in the Territory of Hawaii, including 1,230 shares of Victoria Ward, Limited, a corporation duly organized under and existing by virtue of the laws of the Territory of Hawaii, and having a principal place of business in Honolulu, City and County of Honolulu, Territory of Hawaii; that Hattie Kulamanu Ward's shares of stock constitute the most valuable asset of her estate, and represents in value a substantial portion of her estate.

V.

That heretofore in these proceedings, pursuant to the petition filed by said Lani W. Booth and Mellie E. Hustace, and after hearing, this Court made and entered an order appointing The Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward; that the order of this Court was made without the Court being fully apprised of the facts upon certain fraudulent misrepresentations and concealment of material facts, hereinafter more particularly set forth, that as a result, a full and fair hearing upon [58] said petition was not had, and that unless this Court vacates its order appointing The Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, or removes said company as said Guardian and holds further hearings for the taking of further testimony respecting the issues raised by the petition herein, and issues an order to show cause as against said Hawaiian Trust Company, Limited, Mellie E. Hustace and Lani W. Booth, directing them to show cause why the order appointing

Hawaiian Trust Company, Limited, should not be vacated or said company removed as such Guardian, that irreparable injury will result to Hattie Kulamanu Ward and to her estate because of the conflict of interests of said Hawaiian Trust Company, Limited, and persons and interests represented and advised by it, and the interests of Hattie Kulamanu Ward and her estate, including her interest as a shareholder in Victoria Ward, Limited, which is hereinafter more particularly described.

VI.

That Movant is informed and believes that Mellie E. Hustace and Lani W. Booth, petitioners herein, and Edward Hustace, who appeared as a witness on behalf of said petitioners, did not disclose to this Court facts necessary for this Court to be advised of the degree of competence of Hattie Kulamanu Ward and business interests of Hattie Kulamanu Ward and her estate, and the suitability of continuing the present management of her estate by Movant; that certain fraudulent misrepresentations were made to this Court by said Edward Hustace in support of said petition; that the purpose of the filing of the petition herein by said [59] petitioners was not to conserve, in the interest of Hattie Kulamanu Ward, her property and estate, but to gain control, through the appointment of a trustee acceptable to to them, of Victoria Ward, Limited, in which Hattie Kulamanu Ward owns shares of stocks as aforesaid, for the personal benefit and interest of said petitioners, of Edward Hustace, grandson of petitioner,

Mellie E. Hustace, and Cenric Nourse Wodehouse, and for the purpose of removing from office the present officers of Victoria Ward, Limited, who have for many years managed its affairs profitably to its stockholders, including Hattie Kulamanu Ward, and for the purpose of placing in office persons acceptable to them, including Edward Hustace, whose unfitness and incompetence to manage or participate in the management of Victoria Ward, Limited, has already been proven, as more particularly hereinafter set forth; that said petitioners sought the appointment of Hawaiian Trust Company as Guardian of said estate because said Hawaiian Trust Company is friendly to them and their purpose, and can, by voting the stock of Hattie Kulamanu Ward as the Guardian of her estate, together with the stock of petitioners and the persons named above, control a majority of stock of Victoria Ward, Limited; that the removal of the present officers and directors of Victoria Ward, Limited, will be to the detriment of the rights and estate of Hattie Kulamanu Ward and no financial benefit will result from the removal of the present management of Victoria Ward, Limited.

VII.

Upon information and belief, Movant alleges that unless the relief prayed herein is granted, the purpose of the petitioners to gain control of Victoria Ward, Limited, [60] and the removal of the present management of said company will be accomplished because of the facts hereinafter alleged and in the manner hereinafter described.

VIII.

That Victoria Ward, Limited, is a family corporation in which all the stockholders are children of Victoria Ward, or children of deceased children; that there are outstanding 5,200 shares of stock of the par value of \$100.00 each; that the stock of Victoria Ward, Limited, is owned as follows:

Hattie Kulamanu Ward, daughter of	
Victoria Ward.....	1,230 shares
Cenric Nourse Wodehouse, son of Mae	
Wodehouse, deceased daughter of	
Victoria Ward.....	642 shares
Lani W. Booth, daughter of	
Victoria Ward.....	874 shares
Mellie E. Hustace, daughter of	
Victoria Ward.....	10 shares
Kathleen Ward, daughter of	
Victoria Ward.....	1,222 shares
Lucy K. Ward, daughter of	
Victoria Ward.....	1,222 shares

that the present officers and directors of Victoria Ward, Limited, are as follows:

Victoria Kathleen Ward, President and Director.
 Henry C. Hapai, Vice-President and Director.
 William D. Holt, Secretary and Director.
 Lucy K. Ward, Treasurer and Director.
 Hattie Kulamanu Ward, Director.

IX.

That the petitioners herein, Lani W. Booth and Mellie E. Hustace, own sufficient stock in Victoria Ward, Limited, [61] together with Cenric Nourse

Wodehouse who, Movant on information and belief alleges, will vote with petitioners and The Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, to remove the present officers and managers of Victoria Ward, Limited, having a 356-vote margin over the stock owned by Victoria Kathleen Ward, President and Director of Victoria Ward, Limited, and Lucy K. Ward, Treasurer and Director of said company, and present managers of said company, together with Henry C. Hapai, Vice-President and Director, and William D. Holt, Secretary and Director.

X.

That Movant is informed and believes that the stock owned by Cenric Nourse Wodehouse, as well as his other property and estate, is managed by The Hawaiian Trust Company, Limited, on his behalf; that as a result of the ownership and control of stock as aforesaid, The Hawaiian Trust Company, Limited, can control Victoria Ward, Limited, acting with the petitioners as aforesaid.

XI.

That the petitioner, Mellie E. Hustace, for a considerable period of time prior to June, 1946, sought to have Movant herein and the other managing directors of Victoria Ward, Limited, employ her grandson, Edward Hustace, to work for the corporation; that by reason of said entreaties, the managing directors did, in June, 1946, employ Edward Hustace to work for Victoria Ward, Limited; that Edward Hustace, who testified herein as a witness in support

of petitioners and in support of the appointment of [62] The Hawaiian Trust Company as Guardian of the Estate of Hattie Kulamanu Ward, falsely represented to this Court that he was employed to manage Victoria Ward, Limited; that during the term of his employment, Edward Hustace was employed in the Ala Moana Market Center, a division of Victoria Ward, Limited; that in such position he failed to keep proper records and accounts; that he incurred debts and obligations without authority; that as a result of his mismanagement and unauthorized actions, considerable loss resulted to Victoria Ward, Limited, and he was discharged by the Board of Directors on November 30, 1948; on information and belief, Movant alleges that when Edward Hustace was advised prior to that date that he was to be discharged, he persuaded petitioner Mellie E. Hustace and his aunt, Lani W. Booth, to file these proceedings to gain control of the corporation by gaining control of the stock of Hattie Kulamanu Ward; that Edward Hustace, while he was employed by said corporation, drew up a plan of reorganization calling for the removal of the present officers and his appointment as manager, which Movant on information and belief alleges it is the intention of petitioners to put into effect, unless this Court grants the relief herein prayed.

XII.

Upon information and belief, Movant says that The Hawaiian Trust Company, Limited, heretofore appointed by this Court as Guardian of the Estate of Hattie Kulamanu Ward, represents other indi-

viduals and interests antagonistic to and conflicting with the interests of the estate of Hattie Kulamanu Ward and with her interest as a substantial shareholder in Victoria [63] Ward, Limited; that these antagonistic and conflicting interests were not revealed and disclosed to the Court at the time the Court made and entered its order herein appointing said Hawaiian Trust Company, Limited, Guardian of said estate; that some of the conflicting interests are hereinafter described.

XIII.

That The Hawaiian Trust Company, Limited, represents other interests and estates which at the present time have leases with Victoria Ward, Limited.

XIV.

Movant alleges on information and belief that Robertson, Castle & Anthony, attorneys for the petitioners, Mellie E. Hustace and Lani W. Booth, who represented them in this petition, are the regularly employed attorneys for The Hawaiian Trust Company, Limited, and are now and will continue to act as attorneys for The Hawaiian Trust Company, Limited, in the affairs of that company as Guardian of the Estate of Hattie Kulamanu Ward, unless the relief herein prayed is granted; that a confidential relationship therefore exists between the petitioners who procured the appointment of The Hawaiian Trust Company, Limited, as said Guardian, and that by reason of the plans of said petitioners to control said estate, there is a conflict of interest between the

petitioners, their counsel and The Hawaiian Trust Company, Limited, and the same counsel and the rights and interest of Hattie Kulamanua Ward.

XV.

Movant alleges on information and belief that a Mr. [64] Cameron, who is employed by The Hawaiian Trust Company, Limited, is now or has been the adviser of the petitioner Lani W. Booth, and has assisted her in the management of her property and in making her tax returns; that the petitioner, Lani W. Booth, owns 162 shares of stock in the Hawaiian Trust Company, Limited; that said petitioner did not, in the hearing on the petition, advise the Court of this fact.

XVI.

That the guardian ad litem appointed by the Court for Hattie Kulamanu Ward advised the Court that conflicting interests between the interest of the Estate of Hattie Kulamanu Ward "would arise principally because of the fact that the property owned by the corporation would be property that might be leased to interests which The Hawaiian Trust Company, Limited, might otherwise represent"; that the Court was not apprised of the ownership of stock in said company by the petitioners who sought the appointment of said Company.

XVII.

Movant further alleges on information and belief that the fact that the petitioner, Mellie E. Hustace, who sought the appointment of The Hawaiian Trust

Company, Limited, owns 62 shares of stock in said Company, was not disclosed to the Court.

XVIII.

Movant further alleges on information and belief that The Hawaiian Trust Company, Limited, manages and acts for Cenric N. Wodehouse, who owns 642 shares of stock of Victoria Ward, Limited, and that said Cenric N. Wodehouse owns 62 shares of stock in said Hawaiian Trust Company, Limited; that the father of Cenric N. Wodehouse, Ernest [65] H. Wodehouse owns 1,150 shares of stock in said Hawaiian Trust Company, Limited, and is now and has been for many years a director of said Hawaiian Trust Company, Limited.

XVIX.

Movant further alleges that The Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, has informed her that the said Hawaiian Trust Company, Limited, intends to have one of its officers placed on the Board of Directors of Victoria Ward, Limited; that the interests of said Hawaiian Trust Company, Limited, are in conflict with and antagonistic to the interests of Hattie Kulamanu Ward, and it would not be to the interest of said Hattie Kulamanu Ward or her estate, or to the interest of Victoria Ward, Limited, to whose interests said Trust Company's interests are also antagonistic, to have an officer of said Trust Company on the Board of Directors of Victoria Ward, Limited, or to act for said company or to have control of the stock of Hattie Kulamanu Ward therein.

XX.

That the regular annual meeting of stockholders of Victoria Ward, Limited, takes place on Monday, March 14, 1949, and that it is not in the interest of the estate of Hattie Kulamanu Ward that The Hawaiian Trust Company, Limited, be permitted to vote said stock because of the conflict of interest heretofore referred to, and that if The Hawaiian Trust Company, Limited, is not restrained by this Court from voting said stock pending a hearing on this motion and order to show cause, irreparable injuries will result to the estate of Hattie Kulamanu Ward and her interest as [66] a stockholder in Victoria Ward, Limited; on information and belief, Movant alleges that at said meeting, petitioners and said Hawaiian Trust Company, Limited, intend to remove the present management of said company; that such removal is not in the interest of the estate of Hattie Kulamanu Ward or of Victoria Ward, Limited, in which she owns stock; that there is no adequate remedy at law or otherwise, whereby Hattie Kulamanu Ward's estate can be protected unless a temporary restraining order is issued against The Hawaiian Trust Company, Limited, prohibiting it from voting the stock of Hattie Kulamanu Ward at said meeting pending hearing and determination of the matters set forth in this motion.

XXI.

That Movant and the other directors and officers have managed Victoria Ward, Limited, profitably for many years; that they are thoroughly familiar with

the affairs of the corporation and it would be detrimental to the interest of Hattie Kulamanu Ward to change management at this time; that under their management, the assets of the estate have constantly increased and the profits of the company have increased; that from authorized capital stock of Ten Thousand Dollars (\$10,000.00), when the corporation was formed in the year 1930, the worth of the corporation has increased until its book value as of December 31, 1948, is \$709,281.95; that this book value is far less than its true cash or market value today since the real property and improvements thereon are carried at tax appraised value; that the cash market value of the corporation today is in excess of \$1,000,000; that the net profits of the company have increased constantly; [67] that as of December 31, 1933, the income of said company was \$25,408.92; that as of December 31, 1948, for the preceding year, its income was \$239,470.11.

XXII.

That Movant has for many years been the attorney-in-fact and manager of the property of Hattie Kulamanu Ward, who has always entrusted Movant with her business affairs; that under the management of Movant, the income of the estate of Hattie Kulamanu Ward has increased from \$4,011.14 in the year ending December 31, 1933, to \$37,097.64 in the year ending December 31, 1948; that Movant does not now have nor has she ever had any interest in conflict with Hattie Kulamanu Ward; that she has lived all her life with her sister at their present

residence on King Street, and has the confidence, love and trust of Hattie Kulamanu Ward; that she has expended the same care in the management of the property of Hattie Kulamanu Ward as she has of her own estate; that at the present time and for many years past, Hattie Kulamanu Ward has been a substantial beneficiary under her will.

XXIII.

That a full and complete hearing to determine the degree of competency of Hattie Kulamanu Ward and the necessity and desirability of appointing a trustee of her estate has not been had; that Hattie Kulamanu Ward has never managed her business affairs, but has entrusted their management to others in whom she reposes trust and confidence; that it is an injustice and not in her interest and welfare that in the declining years of her life she be subjected to changes in the management of her affairs, and the humiliation [68] of these proceedings which disturb and upset her physical health and mental happiness; that Movant, Hattie Kulamanu Ward and Kathleen Victoria Ward have lived in harmony and with love, affection, trust and confidence all the years of their lives; that they reside and have always resided in their present residence.

XXIV.

If after a full and complete hearing, the Court determines that it is necessary to appoint a guardian of the estate of Hattie Kulamanu Ward, it would be to her best interests in every way that either

Movant or Kathleen Victoria Ward, in whom she has had confidence all her life, should be selected.

XXV.

That The Hawaiian Trust Company, Limited, because of the facts hereinbefore set forth, is not a suitable Guardian of the Estate of Hattie Kulamanu Ward, because of conflicting and antagonistic interests to the rights of Hattie Kulamanu Ward.

XXVI.

That if, after full hearing, the Court determines that it is in the interest of Hattie Kulamanu Ward that a guardian of her estate be appointed, and that neither Movant nor Victoria Kathleen Ward are suitable, it would be in the interest of Hattie Kulamanu Ward that a disinterested person, familiar with her affairs, be appointed.

XXVII.

That unless an order to show cause is directed by this Court against The Hawaiian Trust Company, Limited, directing it to show cause why it should not be removed as Guardian [69] of the Estate of Hattie Kulamanu Ward, irreparable injury will result to the estate and property of Hattie Kulamanu Ward; that there is no adequate remedy at law or otherwise to protect the interest of Hattie Kulamanu Ward except this proceeding, and unless after full hearing of said order to show cause, The Hawaiian Trust Company, Limited, is removed as Guardian of said Estate.

Wherefore, Movant prays this Honorable Court:

1. That orders issue out of and under the seal of this Honorable Court, as provided by law, directed to The Hawaiian Trust Company, Limited, Mellie E. Hustace and Lani W. Booth, ordering them to appear 4 days from the date of the filing of this motion and at a place designated by the Court, and then and there to show cause, if any they have, why the order appointing Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, should not be vacated or said Guardian removed, why further hearings respecting the issues raised by the petition herein should not be held; and

2. That pending hearing on such order to show cause, a temporary restraining order without notice, restraining and prohibiting The Hawaiian Trust Company, Limited, from voting the stock of Hattie Kulamanu Ward in Victoria Ward, Limited, at the annual meeting of stockholders of Victoria Ward, Limited, on March 14, 1949, be issued by this Court; and

3. That after full hearing on the order to show cause, this Court make and enter its order vacating the appointment of Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward or remove said company [70] as Guardian, and if the Court finds it necessary, to appoint a suitable trustee for the estate of Hattie Kulamanu Ward; and

4. For such other and further relief as this Honorable Court may deem just in the premises.

Dated: Honolulu, T. H., this 12th day of March,
A.D., 1949.

/s/ LUCY K. WARD,
Sister, attorney-in-fact and next of kin of friend of
Hattie Kulamanu Ward.

Territory of Hawaii,
City and County of Honolulu—ss.

Lucy K. Ward, being first duly sworn, deposes
and says that she has read the foregoing petition,
knows the contents thereof, and that the allegations
contained therein are true and correct except as to
those allegations made on information and belief,
and as to those matters, she believes them to be true.

/s/ LUCY K. WARD.

Subscribed and sworn to before me this 12th day
of March, 1949.

[Seal] /s/ EILEEN N. FUJIMOTO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires July 31, 1951.

Certified true copy.

[Endorsed]: Filed Circuit Court, T. H., March
12, 1949. [71]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

[Title of Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

Upon the reading, filing and consideration of the verified motion herein praying for an order directed to The Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, Mellie E. Hustace and Lani W. Booth to appear and show cause why an order vacating the appointment of said Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, or to remove said guardian, should not be issued, and further hearings held herein on the issues raised by the petition heretofore filed herein, and further praying that pending the hearing of said Order to Show Cause, a Temporary Restraining Order be issued herein without notice, and

It appearing to the Court from said motion that if a Temporary Restraining Order is not granted without notice, The Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, will vote the shares of stock of Victoria Ward, Limited, held by said estate, at [72] the annual meeting of stockholders to be held on Monday, March 14, 1949, to the detriment of said estate, before this Court can determine on the merits the right of Movant to the relief prayed, thereby caus-

ing great and irreparable injury to Hattie Kulamanu Ward, and the Court being fully advised in the premises and it being a proper case for this order,

It Is Hereby Ordered that The Hawaiian Trust Company, Limited, Mellie E. Hustace and Lani W. Booth be and they are hereby ordered to appear before the undersigned Judge at his courtroom, Honolulu, T. H., on the 16th day of March, 1949, at the hour of 9:00 a.m., to show cause if any they have why the relief prayed for should not be granted.

It is further ordered that pending the hearing of said Order to Show Cause, said Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, be and it is hereby restrained and enjoined until the further order of this Court from voting the stock belonging to the Estate of Hattie Kulamanu Ward in Victoria Ward, Limited, at the annual meeting of stockholders on Monday, March 14, 1949, or otherwise.

It is further ordered that a copy of this order together with the motion be served upon The Hawaiian Trust Company, Limited, as Guardian of the Estate of Hattie Kulamanu Ward, Mellie E. Hustace and Lani W. Booth at least 2 days prior to the 16th day of March, 1949.

Dated: March 12, 1949, atm., at Honolulu, T. H.

[Seal] /s/ WILLSON C. MOORE,

Judge of the Above Entitled
Court. [73]

Officer's Return

Served the within motion to vacate order appointing Hawaiian Trust Company, Limited, guardian; Order to Show Cause and Temporary Restraining Order on Hawaiian Trust Company, Limited, through A. F. Mahn, its vice-president and treasurer; Mellie E. Hustace, through Mr. Frank Hustace, Jr. (Heen, Kai & Stephenson), who accepted service on her behalf; and Lani W. Booth through Mr. Garner Anthony (Robertson, Castle & Anthony), who accepted service on her behalf, at Honolulu, Oahu, T. H., this 14th day of March, 1949, by delivering to each of them a true and attested copy thereof and at the same time showing them the original.

Dated: March 14, 1949.

/s/ JOHN YOUNG,
Deputy Sheriff, T. H.

Certified true copy.

[Endorsed]: Filed Circuit Court, T. H., March 12, 1949. [74]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU WARD,

An Incompetent.

ORDER VACATING APPOINTMENT OF
NEXT FRIEND; VACATING RESTRAINING
ORDER AND DENYING MOTION FOR
REMOVAL OF GUARDIAN

Pursuant to the oral decision of the Court rendered March 16, 1949, in the above cause, It Is Hereby Ordered:

(1) That the order entered March 12, 1949, appointing Lucy K. Ward as next friend of Hattie Kulamanu Ward, an incompetent person, is hereby vacated;

(2) That the temporary restraining order entered March 12, 1949, enjoining Hawaiian Trust Company, Limited, guardian of the Estate of Hattie Kulamanu Ward from voting the shares of stock belonging to said incompetent in Victoria Ward, Limited, is hereby vacated;

(3) That the motion of Lucy K. Ward for the removal of Hawaiian Trust Company, Limited, as guardian is hereby denied.

(4) That Lucy K. Ward pay counsel fees for

Hawaiian Trust Company, Limited, guardian of Hattie Kulamanu [76] Ward in this proceeding in the sum of \$100, together with costs.

Dated: Honolulu, Hawaii, March 17, 1949.

[Seal] /s/ A. M. CRISTY,
 Presiding Judge.

Attest:

 /s/ WILLIAM C. ING,
 Clerk.

Certified true copy.

[Endorsed]: Filed Circuit Court, T. H., March 17, 1949. [77]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

P. No. 15530

[Title of Cause.]

APPEAL AND NOTICE OF APPEAL

Comes now the petitioner Lucy K. Ward, next of friend of Hattie Kulamanu Ward, the above-named incompetent, by her counsel, and hereby gives notice of appeal and does hereby appeal to the Supreme Court of the Territory from the order of the Honorable A. M. Cristy in the above-entitled cause, vacating her appointment as next friend, vacating restraining order, and denying motion for removal of guardian entered on the 17th day of March, 1949, against Hattie Kulamanu Ward by Lucy K. Ward, next of friend.

Dated: Honolulu, T. H., this 25th day of March, 1949.

LUCY K. WARD,
Next of Friend of Hattie Kulamanu Ward, Petitioner herein,

By BOUSLOG & SYMONDS,
By /s/ HARRIET BOUSLOG,
Her Attorney.

Receipt of copy acknowledged.

Certified true copy.

[Endorsed]: Filed Circuit Court, T. H., March 25, 1949. [79]

In the Supreme Court of the Territory of Hawaii
No. 2762

Error to the Circuit Court, First Judicial Circuit, the Honorable Albert M. Cristy, at Chambers in Probate Proceedings.—Probate No. 15530.

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU WARD,

An Incompetent.

WRIT OF ERROR

The Territory of Hawaii, Greeting:

To the Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

Application having been made on behalf of Lucy

K. Ward, next of friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward, intervenors, for a writ of error in the above-entitled cases, you are commanded forthwith to send to the Supreme Court the record in said cases.

Witness, the Honorable S. B. Kemp, Chief Justice of the Supreme Court of the Territory of Hawaii, this 13th day of April, 1949.

[Seal]

LEOTI V. KRONE,

Clerk of the Supreme Court.

To the Clerk of the Supreme Court:

The execution of the within writ of error appears by the record hereto annexed.

Dated: Honolulu, T. H., this 29th day of April, 1949.

[Seal]

/s/ MARGARET K. HEINE,

Clerk, Circuit Court, First Judicial Circuit, Territory of Hawaii.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., April 13, 1949. [81]

In the Supreme Court of the Territory of Hawaii
No. 2762

[Title of Cause.]

ASSIGNMENTS OF ERROR

1. The Circuit Judge at Chambers erred in appointing the Hawaiian Trust Company, Ltd., as Guardian of the Estate of Hattie Kulamanu Ward in that the record before him shows:

(a) That the Hawaiian Trust Company has or might have conflicting interests with the Estate of Hattie Kulamanu Ward.

(b) That the petitioning sisters of the alleged incompetent affirmatively sought the appointment of the Hawaiian Trust Company, Ltd., as Guardian, and that the application was opposed by two other sisters with equal interests and equal rights with the petitioners.

(c) That the court was advised at the time of said appointment that a family difference of opinion in respect to the control of the family corporation, in which the alleged incompetent owns stock, was involved in the proceedings for the appointment of the Hawaiian Trust Company as Guardian of the Estate, and that the appointment of such Guardian would or might give to petitioners' side of the family control of the corporation. [83]

2. That the Circuit Judge at Chambers abused his discretion in appointing the Hawaiian Trust Company, Ltd., as Guardian of the Estate of Hattie Kulamanu Ward, on the basis of the record before him.

3. That the Circuit Judge at Chambers erred in refusing to permit counsel for intervenors to question petitioners and witnesses supporting the petition concerning the motive of petitioners in seeking to have a guardian appointed for the alleged incompetent, and in sustaining objections to this line of questions.

4. That the Circuit Judge at Chambers erred in refusing to permit testimony as to the interest of petitioners and their motives in seeking the appointment of the Hawaiian Trust Company, Ltd., and sustaining objections to this line of questions.

5. That the Circuit Judge at Chambers erred in holding as a matter of law that Lucy K. Ward and Kathleen Ward were unsuitable guardians because, as a matter of law, their interests were conflicting, or alternately

6. If all sisters of the alleged incompetent had conflicting interests as a matter of law, the Circuit Judge at Chambers erred in appointing a guardian satisfactory to the petitioning sisters and unsatisfactory to Lucy K. Ward and Kathleen Ward, intervening sisters, who had equal interest, particularly in view of the fact that the stock of alleged incompetent would give petitioners control of a family corporation, in which the alleged incompetent owns substantial stock.

7. That the Circuit Judge at Chambers erred in vacating the order appointing Lucy K. Ward next of friend of [84] Hattie Kulamanu Ward, in vacating a temporary restraining order issued, and refus-

ing to hold hearing on an injunction pending the outcome of the litigation, and in denying the motion for the removal of the Hawaiian Trust Company, Ltd., as Guardian of the Estate of Hattie Kulamanu Ward, without permitting hearing on the petition of Lucy K. Ward as next of friend of Hattie Kulamanu Ward.

8. That the Circuit Judge at Chambers erred in denying a hearing on the motion to remove the Hawaiian Trust Company, Ltd., as guardian of the trustee on the ground that it was unsuitable and had conflicting interests with the estate of the alleged incompetent, in that, as a matter of law, petitioner was entitled to a hearing on the motion to remove the guardian.

9. That the Circuit Judge at Chambers erred in denying a hearing on the merits of the motion of Lucy K. Ward, as next of friend of Hattie Kulamanu Ward, to remove the Hawaiian Trust Company, Ltd., as Guardian of the Estate of Hattie Kulamanu Ward, since the motion of petitioner stated grounds in her verified complaint entitling her to a hearing and to the relief prayed.

10. That on the basis of the verified petition and the record before him, the Circuit Judge at Chambers abused his discretion in denying a hearing on the motion to vacate the order appointing the Hawaiian Trust Company, Ltd., as Guardian of the Estate of Hattie Kulamanu Ward and in reopening the proceedings for the taking of further evidence.

11. That the Circuit Judge at Chambers, in [85]

the course of the hearing of the motion to remove the Hawaiian Trust Company as Guardian of the Estate of Hattie Kulamanu Ward, manifested such strong bias and prejudice against petitioner Lucy K. Ward, as next of friend of Hattie Kulamanu Ward, and against her counsel, by abusive and intemperate charges, unwarranted and unjustified by any evidence before him; that petitioner was denied due process of law and a full and fair hearing on her petition on behalf of Hattie Kulamanu Ward to remove Hawaiian Trust Company as Guardian of the Estate of Hattie Kulamanu Ward, and further manifested such bias and prejudice in favor of the Hawaiian Trust Company and petitioners as to deny petitioner due process of law and a full and fair hearing.

Wherefore, the petitioners, Lucy K. Ward, as next of friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward, intervenors, pray that the order appointing Hawaiian Trust Company as Guardian of the Estate of Hattie Kulamanu Ward, made and entered by the said judge on January 13, 1949, be reversed, and that petitioner, Lucy K. Ward, as next of friend of Hattie Kulamanu Ward, be granted a hearing on her motion to vacate the order appointing Hawaiian Trust Company, Ltd., as Guardian of the Estate of Hattie Kulamanu Ward, to remove said Guardian, to hold further hearings respecting the issues raised by the petition, and for a restraining order against the Hawaiian Trust Company as Guardian of the Estate of Hattie Kulamanu Ward, pending the determination of the

issues at said hearing, and that [86] petitioners be granted such other and further relief as may be meet and proper in the premises.

Dated: Honolulu, T. H., this 13th day of April, 1949.

LUCY K. WARD,

Next of Friend of Hattie Kulamanu Ward, Lucy K.
Ward and Kathleen Ward, Intervenors,

By BOUSLOG & SYMONDS,

By /s/ HARRIET BOUSLOG,

Their Attorneys.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., April
13, 1949. [87]

In the Supreme Court of the Territory of Hawaii
No. 2762

[Title of Cause.]

STIPULATION

It is hereby stipulated that the documents and records filed in this Court pursuant to the Amended Praecipe in the appeal of Lucy K. Ward, next of friend of Hattie Kulamanu Ward, in the matter of the guardianship of Hattie Kulamanu Ward, an incompetent, in the Circuit Court of the First Judicial Circuit, at Chambers in Probate, from the order of the Honorable A. M. Cristy, presiding judge, vacating her appointment as next of friend, vacating a temporary restraining order issued therein, and denying her motion for removal of guardian, are

the same documents and records required to be filed in this Court by the Praecipe in this writ of error proceeding, and that the documents and records in that appeal may be incorporated herein by reference without requiring duplication thereof, and may be made a part of the records herein as fully as if actually set forth.

Dated: Honolulu, T. H., this 25th day of April, 1949.

/s/ J. GARNER ANTHONY,
Attorney for Hawaiian Trust Company, Ltd.,
Guardian of the Estate of Hattie [89] Kula-
manu Ward, and Lani W. Booth, and Mellie E.
Hustace, Petitioners.

/s/ HARRIET BOUSLOG,
Attorney for Lucy K. Ward, Next of Friend of
Hattie Kulamanu War, and Lucy K. Ward,
and Kathleen Ward, Petitioners Herein.

The foregoing stipulation is approved and it is hereby ordered that the documents and records heretofore filed in the above-mentioned appeal may be incorporated by reference as the documents and records required by the Praecipe herein.

Dated: Honolulu, T. H., this 25th day of April, 1949.

[Seal] /s/ S. B. KEMP,
Chief Justice.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., April 25, 1949. [90]

In the Supreme Court of the Territory of Hawaii

Nos. 2761 and 2762

[Title of Cause].

STIPULATION FOR CONSOLIDATION

It is hereby stipulated by and between the appellants, Lucy K. Ward, next of friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward, intervenors, by their attorneys, Bouslog & Symonds, and by The Hawaiian Trust Company, Ltd., Guardians of the Estate of Hattie Kulamanu Ward, Lani W. Booth and Mellie E. Hustace, by their attorneys, Robertson, Castle & Anthony, that the above-entitled causes may be consolidated for the purpose of briefing and hearing.

Dated: Honolulu, T. H., this 12th day of [92] May, 1949.

LUCY K. WARD,

Next of Friend of Hattie Kulamanu Ward, and
Lucy K. Ward and Kathleen Ward, Inter-
venors,

By BOUSLOG & SYMONDS,
Their Attorneys,

By /s/ HARRIET BOUSLOG.

HAWAIIAN TRUST
COMPANY, LTD.,

Guardian of the Estate of Hattie Kulamanu Ward,
and Lani W. Booth and Mellie E. Hustace, Peti-
tioners,

By ROBERTSON, CASTLE &
ANTHONY,
Their Attorneys,

By /s/ J. GARNER ANTHONY.

Approved:

[Seal] /s/ S. B. KEMP,
Chief Justice.

Certified true copy.

[Endorsed]: Filed Supreme Court, T. H., May
12, 1949. [93]

In the Supreme Court of the Territory of Hawaii
October Term, 1950

Nos. 2761 and 2762

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU WARD,

An Incompetent.

Appeal from Circuit Judge First Circuit, and
Error to Circuit Judge First Circuit

Hon. A. M. Cristy, Judge.

OPINION

Argued January 10, 1951.

Decided February 2, 1951.

Le Baron and Towse, JJ., and Circuit Judge Corbett in place of Kemp, C. J., Retired.

Constitutional Law—construction—Seventh
Amendment

The Seventh Amendment of the Constitution does not apply to guardianship proceedings in insanity cases.

Statutes—construction—section 12529 of Revised Laws of Hawaii 1945—ground for removal of duly appointed guardian.

Section 12529 of Revised Laws of Hawaii, 1945, operates in futurity from time of appointment of

a guardian. It grants discretionary authority to remove a duly appointed guardian and specifies an alternative ground for removal as the exclusive cause on which [94] he may be removed but that cause can only have its being in events occurring after his appointment and showing that he no longer is sane or otherwise capable of or suitable for discharging his trust duties.

Appeal and Error—presentation and reservation in lower court of grounds of review—issues and questions in lower court—necessity of presentation in general.

Questions not properly raised and preserved below and alleged errors of law or alleged abuses of discretion not called to the attention of the trial judge or made the subject of objection and exception at the time they were purportedly committed need not be considered by an appellate court unless it is of the opinion that manifest error patently appears on the record injuriously affecting substantial rights of appellant on writ of error.

Same—review—discretion of lower court—proceedings after judgment—refusal to hear motion to vacate on its merits.

To grant or deny a hearing on the merits of a motion to vacate an order appointing a guardian is within the sound discretion of the presiding judge and his denial thereof should not be disturbed unless clearly an abuse of discretion. [95]

Opinion of the Court by Le Baron, J.

This is a writ of error sued out jointly by Lucy K. Ward and Kathleen Ward as intervenors, and individually by Lucy K. Ward as next friend of their sister Hattie Kulamanu Ward. Consolidated with the writ in this court is an appeal by the said Lucy K. Ward as next friend of the said Hattie Kulamanu Ward. The writ stems from two sets of proceedings below. One set is that of original guardianship proceedings instituted by petition of Lani W. Booth and Mellie E. Hustace, also sisters of Hattie Kulamanu Ward, for the appointment of a guardian of her estate on the ground of incompetency on her part to manage such estate. The other is that of proceedings, subsequent to the appointment of the guardian in the original guardianship proceedings, instituted by motion of Lucy K. Ward, as next friend to vacate the order of appointment or to remove such guardian. The appeal stems from the subsequent proceedings only.

The petition for appointment of a guardian in the original guardianship proceedings named Lucy K. Ward as attorney-in-fact of the alleged incompetent. Notice was served on the alleged incompetent on the filing of the petition. Thereafter an attorney at law was appointed for her as guardian ad litem. At a hearing before the probate judge at chambers without a jury, the alleged incompetent was not present, but represented by the guardian ad litem. Lucy K. Ward and Kathleen Ward as intervenors were not present but both were represented by respective attorneys. The petitioners appeared with

their attorneys. Evidence of insanity at the hearing was [96] undisputed and proved to the judge's satisfaction that Hattie Kulamanu Ward is mentally incapable of managing her estate. On evidence of suitability the probate judge found that Hawaiian Trust Company, Limited, is "a fit and proper person to be appointed" as guardian of her estate. After the hearing the probate judge entered an order appointing Hawaiian Trust Company, Limited, guardians of the incompetent's estate. Accordingly, letters of guardianship were issued to the guardian upon it giving an approved bond in the sum of \$10,000, conditioned in accordance with law. Ever since so qualifying Hawaiian Trust Company, Limited, has been the legally constituted guardian of the incompetent's estate.

In the subsequent proceedings Lucy K. Ward, during the absence of the probate judge who had presided in the original guardianship proceedings, petitioned a different probate judge for the appointment of herself as next friend of the incompetent "for the purpose of representing her in a motion to vacate an order appointing Hawaiian Trust Company, Limited, Guardian of the Estate of Hattie Kulamanu Ward or to remove such guardian and for other relief necessary to protect the interests of said Hattie Kulamanu Ward and her estate and property." For such purposes that probate judge appointed Lucy K. Ward as next friend of the incompetent. Pursuant thereto, Lucy K. Ward in that capacity filed a motion to vacate the order appointing the guardian or to remove such guardian and

to rehear the issues previously determined by such order as well as to protect the interests of the incompetent pending disposition of the motion. [97] That motion contained two main prayers. One is for an order to compel the guardian and the petitioners in the original guardianship proceedings to show cause why the order appointing the guardian should not be vacated or, as an alternative, why the guardian should not be removed. The other is for a temporary restraining order without notice to prevent the guardian from voting stock of the incompetent pending disposition of the motion to vacate or to remove. Upon reading the motion at the time of its filing, the judge who made the appointment of next friend granted those prayers and issued appropriate ex parte orders in accordance therewith. Before the day set therein to show cause, the guardian and petitioners filed a combined answer and return to the motion and order to show cause, which by way of answer to the motion denied the allegations thereof, and by way of return to the order pointed to the record of the original guardianship proceedings as good cause why the guardian should not be removed. On the day set, extensive arguments on both sides were heard by the probate judge who presided in the original guardianship proceedings. At the conclusion thereof the probate judge entered an order dissolving the ex parte order of restraint and denying the motion without a hearing on its merits. From this state of the record concerning these subsequent proceedings it is evident that the underlying relief, sought by the movant and denied

by the probate judge, is to have previously determined issues reheard for the sole purpose of discharging the guardian from the trust originally imposed upon it. [98]

The writ challenges the order appointing the guardian of the incompetent's estate and in conjunction with the appeal challenges the order dissolving the ex parte order of restraint and denying the motion to vacate that order or to remove such guardian without a hearing on its merits. Those orders are challenged in eleven assignments of error. But preliminary thereto, the appellants raise for the first time on appeal the constitutional question whether or not the provisions of section 12509 of Revised Laws of Hawaii 1945, on which the jurisdiction of the probate judge in the original guardianship proceedings below is based, contravenes the Seventh Amendment of the Constitution which declares "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved."

The question in so far as it goes to the jurisdiction of the probate judge does not require any construction of section 12509, which in derogation of the common law clearly permits a probate judge in guardianship proceedings "after a full hearing" to adjudge an alleged incompetent to be insane and to appoint "a guardian of his person or estate or both" without the intervention of a jury. But it does require the Seventh Amendment to be interpreted as to the meaning of its clause "In suits at common law, where the value in contro-

versy shall exceed twenty dollars” with respect to guardianship proceedings in insanity cases. The appellants concede that the Supreme Court of the United States has had no occasion to interpret, and has not interpreted, that clause with respect thereto nor have they cited any clear authority of a lower court to [99] hold that guardianship proceedings in insanity cases constitute “suits at common law, where the value in controversy * * * exceed[s] twenty dollars” within the meaning of the Amendment and there are apparently none to be found even though such proceedings were known to the common law long before the Amendment was adopted in 1791. From such dearth of authority a serious doubt arises that guardianship proceedings in insanity cases constitute suits at common law in which there is any value in controversy within the meaning of the Amendment. That they are not such suits is strongly indicated by the fact that there is no value therein to be brought into controversy on determining whether or not an alleged incompetent be of unsound mind and incapable of managing his own affairs. Nor can it be argued with reason that such a controversy arises when a presiding judge inquires into the amount and character of the estate of an adjudged insane person for the purpose of appointing a suitable person to manage that estate as guardian, or for that of fixing an appropriate bond, mere value of such estate not being in controversy as a subject of dispute in the cause itself for the appointment of a guardian.

Consistent with the common origin of the power of the lord chancellor as the keeper of the king's conscience to act in lieu of the king as general guardian of all infants, idiots and lunatics and of the equitable jurisdiction of courts of chancery, which grew out of the ancient practice of petitioning the king, as the fountain of justice, for relief in those particular cases where the positive law, *lex scripta*, was deficient, guardianship proceedings in insanity cases before [100] a probate judge as the successor to the lord chancellor have much in common with the civil causes in courts of equity as the successors to the courts of chancery. Although such proceedings differ generally from such causes, the particular difference to be noted for the purposes of this opinion lies in the fact that in civil causes in courts of equity the value is in controversy. Nevertheless, the two are akin in other essential characteristics. Illustrative thereof, guardianship proceedings in insanity cases are special proceedings, equitable in nature, and at common law called for a verdict of a special jury of inquiry on the issue of insanity which was merely advisory for the purpose of informing the conscience of the chancellor. (See *Barbo v. Rider*, *Guardian*, etc., 67 Wis. 598, 607; *In re Slade*, 43 N. Y. S. [2d] 281; *Sporza v. German Savings Bank*, 192 N. Y. 8, 84 N. E. 406; *Matter of Wendell*, a Lunatic, 1 Johns. Ch. 599; *Matter of Tracy*, 1 Paige 580.) This is evident from the character of the common law writs of *de idiota inquirendo* and *de lunatico inquirendo* and those in the nature

of de lunatico in issuing out of chancery on the exercise of the special jurisdiction conferred by the king's "sign manual" to the lord chancellor as the personal representative of the crown. (See *Hamilton v. Traber*, 78 Md. 26, 27 Atl. 229; *Barbo v. Rider*, *Guardian*, etc., *supra*; 1 Bl. Comm. 303, 305; 3 Bl Comm. 427; J. G. Woerner's *American Law of Guardianship* 402; § 122.) On the other hand, a special jury of inquiry in extraordinary cases is impanelled in civil causes in courts of equity to inform the court's conscience similar to the situation in guardianshp proceedings in insanity cases at [101] at common law. But the power of an equity court to do so is not regarded by the Supreme Court of the United States as "equivalent to the right of trial by jury secured by the Seventh Amendment" (*Cates v. Allen*, 149 U. S. 451, 459; see *Whitehead v. Shattuck*, 138 U. S. 146, 151.) Nor is it reasonable to suppose that the framers of the Amendment regarded an advisory jury at probate or in equity as equivalent to a binding jury at law. On the contrary, it is reasonable to assume that they had in mind the distinction between such diverse kinds of jury and used the word "jury" advisedly to denote a binding jury such as prevailed at common law in civil actions in courts of law. Clearly the Supreme Court did not deem that the term "suits at common law" within the meaning of the Amendment applied to civil causes in courts of equity or to other proceedings calling for advisory juries at common law when it declared that "By common law, they

[the framers of the Amendment] meant what the Constitution denominated in the third article 'law'; not merely suits which the common law recognized among its old and settled proceedings." (Parsons v. Bedford et al., 3 Pet. 433, 446, 447.) There are stronger reasons to say that the Amendment itself does not apply to guardianship proceedings in insanity cases than those making it inapplicable to civil causes in courts of equity, not only because the equitable nature of those proceedings and the advisory effect of the verdict in them at common law render them comparable to the character of those civil causes and to the effect of a verdict in them, but because such proceedings for the appointment of a guardian involve no value in controversy as do such civil causes. Those reasons impel this court to interpret the Amendment [102] as excluding guardianship proceedings in insanity cases as well as civil causes in courts of equity from its operation. It follows therefrom that section 12509, even though in derogation of the common law, does not contravene that inapplicable amendment of the Constitution. Perforce, the probate judge had jurisdiction and the constitutional question as preliminarily presented must be answered in the negative.

The eleven assignments of error present four questions of law. The first two questions arise only under the writ of error as presented by the first six assignments. This court will now deal with those two questions. They pertain to alleged errors or alleged abuses of discretion occurring in the origi-

nal guardianship proceedings either at the hearing on the petition for appointment of a guardian or in the appointment of the guardian. But the questions themselves were not presented for the consideration of the probate judge in those proceedings on either occasion, nor were the alleged errors or abuses called to his attention or made the subjects of objection and exception at the time they were purportedly committed. The general rule is that an appellate court will consider only such questions as were raised and properly preserved in the lower court. (For collection of authorities see 3 Am. Jur. 25, § 246, n. 15.) That rule applies to these particular questions unless this court is of the opinion that any of the alleged errors or alleged abuses patently appear on the record as a manifest error injuriously affecting substantial rights of the appellants on writ of error within the meaning of section 9564 of Revised Laws of Hawaii 1945. (See *Territory v. Chong*, 36 Haw. 537; [103] *City and County v. Tam See*, 38 Haw. 592, 602; *Wayne v. New York Life Ins. Co.*, 132 F. [2d] 28; *In re Florsheim*, 24 Fed. Supp. 991; *Taylor v. Catalon*, 140 Tex. 38, 166 S. W. [2d] 102.) But this court is not of that opinion and finds no ground of reversal. On the contrary, it finds on reviewing the record of the original guardianship proceedings that the hearing on the petition and the appointment of the guardian were held and made, respectively, in strict conformity with the provisions of section 12509 and constituted due process of law under the Fifth Amendment.

(See *In re Acherly*, 19 Haw. 535.) This court therefore will not further consider those first two questions or the writ of error in so far as the first six assignments of error are concerned even though it may have the power to do so.

There remains to be considered the last two questions of law, which are kindred and arise under both the writ and appeal as presented by the last five assignments of error. They pertain to the proceedings taken subsequently to the original guardianship proceedings. For convenience, these questions will be stated and considered separately in logical sequence. The first is stated by the appellants in the opening brief to be whether or not it was "error as a matter of law, or an abuse of discretion, to deny appellant [movant] a hearing on the merits of the motion to remove Hawaiian Trust Company, Limited, as the guardian of her estate on the ground that such guardian is unsuitable" as presented by the seventh, eighth, ninth and tenth assignments of error. In oral argument, however, the appellants divided that question into two component parts consonant to the alternative character of the motion to vacate or to remove. [104] In doing so, the question becomes a dual one, i. e., a question of "error as a matter of law" in denying a hearing on the merits of the motion as one to remove the guardian for statutory cause and a question of "an abuse of discretion" in denying a hearing on the merits of the motion as one to vacate the order appointing such guardian. For convenience, the question will be so treated in this

opinion and regarded as two distinct questions. The question of error will be first considered and then that of abuse.

In the subsequent proceedings consistently with the theory thereof, the parties at the hearing on the order to show cause argued the issue of the sufficiency of the motion's allegations to state the statutory cause for removal whereupon the probate judge in resolving that issue in the negative denied the motion without a hearing on its merits. The question of error pertains to such action on the part of the probate judge. Its answer depends on whether the allegations of the motion, if taken to be true on demurrer, are sufficient or insufficient to set forth the statutory cause for removal. Admittedly the test is to be found in the provisions of section 12529, chapter 305, Revised Laws of Hawaii 1945, as applied to the facts alleged in the motion. Those provisions, therefore, must be considered in the light of such facts.

The pertinent part of section 12529 reads: "Where any guardian, appointed either by a testator or by any of the judges hereinbefore mentioned, shall become insane or otherwise incapable of discharging his trust, or unsuitable therefor, * * * any of the judges * * * may remove him * * *". This sentence may be paraphrased without destroying the ordinary meaning of its words and within the plain legislative intent of the section [105] to read; "Any judge, having jurisdiction over guardians under chapter 305, may remove a duly appointed guardian whenever it shall come to pass

after his appointment that he has arrived at such a state of mental deficiency or other incompetence or of unfitness that his further acting as a guardian is incompatible with a proper carrying out of the trust originally imposed upon him." Such paraphrase merely serves to illustrate in different language the meaning of the statute itself. Nevertheless, that meaning is clear from the language employed in the statute. By its terms, the statute presupposes the guardian to have been fully competent, capable and fit to perform his trust duties at the time of his appointment, but contemplates that he may not continue to be so thereafter and to meet that contingency specifies in the alternative a particular cause for removal at a future time. Operating as it does in futurity from the time of appointment, the statute thereafter gives to certain judges a purely discretionary authority, exercisable only in case a duly appointed guardian can no longer properly function as a guardian or ceases to be an appropriate guardian. Until the event of such transition, no judge has any authority to remove a guardian or any basis of right on which to exercise judicial discretion therefor. Thus the granting of authority to remove a guardian as well as the exercise of discretion thereunder is effective after the appointment of the guardian and in the event that he becomes insane or otherwise incapable of, or unsuitable for, discharging his trust duties. This is the sole alternative cause specified by the statute upon which he may be removed. Nor can he be removed except for that specific cause. (See *Estate of Atkins*, [106] 121 Cal. App. 251, 8 P. [2d]

1052; State ex rel. Baker v. Bird, 253 Mo. 569, 162 S. W. 119. Also Anderson's Committee v. Anderson's Admr., 161 Ky. 18, 170 S. W. 213.) As a corollary thereto, the statute from the nature of that cause permits no vicarious removal of the guardian through a reversal or vacation of the order appointing him and authorizes no retrial of the issues previously determined by that order.

The motion as one to remove the guardian for the statutory cause on the ground of unsuitability is patently not predicated on that cause. It does not purport to allege that the guardian since appointment has become either incapable of, or unsuitable for, discharging its trust duties within the meaning of the statute. Nor does it allege the necessary transition affecting the character of the guardian to discharge its trust duties. On the contrary, the whole tenor of the motion relates back to the time of appointment. The motion alleges facts which either had been or could have been advanced at the hearing on the petition for the appointment of a guardian. It seeks in effect to remove the guardian by indirection through a reversal or vacation of the order appointing such guardian and proposes to accomplish that result by a retrial of the issues previously determined by such order. On its face, therefore, it is fatally defective in failing to allege the cause for removal specified by the statute and does not entitle the movant to a hearing on its merits as a matter of law. That patent insufficiency rendered it incumbent upon the probate judge either on demurrer or on its own motion to deny the movant's motion

without a hearing on its merits, there being no alleged facts to be [107] judged as merits of removal. Consequently, his disposition of the motion was proper and does not constitute an "error as a matter of law" as propounded by the question under consideration. Such being the case, this court answers that question in the negative.

Next to be considered is the question of an abuse of discretion in denying a hearing on the merits of the motion as one to vacate the order appointing the guardian. Both parties concede that it is a matter within the sound judicial discretion of the probate judge to grant or deny such a hearing where, as here, that hearing would be nothing more than a rehearing of the issues previously determined by the order of appointment. Thus the propriety of denying the hearing or rehearing as an exercise of that discretion must be tested by the record. The denial thereof was made after the probate judge had been fully advised by the argument of the parties. It was made by the probate judge who had presided in the original guardianship proceedings and in the light of the motion's allegations, the character of which being more conclusory than factual. Upon that record, he deemed that no useful purpose would be served by a hearing on the motion's merits or by a rehearing of the previously determined issues. Nor is this court in a better position to say otherwise, or to declare as a matter of law that he abused his discretion in disposing of the motion as he did. It follows therefrom that there is no manifest abuse

of discretion appearing on the record to justify this court in disturbing the probate judge's exercise of discretion or to entitle the movant [103] to a hearing or rehearing as a matter of law. Consequently, the question of abuse to the same extent as that of error is answered in the negative. The seventh, eighth, ninth and tenth assignments of error, presenting those questions as a dual question, are therefore found to be without merit.

The second and final question of law remaining to be stated and considered is presented by the eleventh assignment of error. It is whether or not the probate judge in making certain observations upon the motives of the movant and the manner of presentation on the part of her attorney while that attorney was arguing the sufficiency of the motion, not only to allege the statutory cause for removal but to warrant a vacation of the order of appointment through a rehearing of previously determined issues, manifested such "bias and prejudice * * * against appellant [movant]" that she was "denied a full and fair hearing and deprived of due process of law." This question is directed at the denial of that motion without a hearing on its merits, the full hearing and due process of law previously afforded in the original guardianship proceedings not being affected by that which may have transpired in subsequent proceedings. Nor does due process of law require a rehearing or more than one trial. (See *In re Acherly*, 19 Haw. 535.) The complete answer in the negative to the question, so directed, has already been effectively given

by this court in finding that the movant as a matter of law was not entitled to a hearing on the merits of her motion as to either the remedy of removal or that of vacation. Consequently, there is no need to decide as a matter of fact whether the probate judge's observations be warranted on the record, or so unwarranted [109] thereon that they manifested bias and prejudice against the movant and her attorney, the actual disposition of the motion itself having been properly made. Suffice it to say that the movant was not only allowed the fullest opportunity permissible in which to argue the sufficiency of her motion before the probate judge, but afforded thereby judicial process in the regular course of administration of justice which more than met the requirements of due process of law. The final question, therefore, is answered in the negative and the assignment presenting it found to be devoid of merit.

Orders affirmed.

/s/ LOUIS LE BARON,

/s/ EDWARD A. TOWSE,

/s/ GERALD R. CORBETT.

Harriet Bouslog (Bouslog & Symonds on the briefs) for appellant and plaintiff in error.

J. G. Anthony (Robertson, Castle & Anthony on the briefs) for appellees and defendants in error.

Certified true copy.

[Endorsed]: Filed Supreme Court T. H., February 5, 1951. [110]

In the Supreme Court of the Territory of Hawaii

Nos. 2761 and 2762

[Title of Cause.]

PETITION FOR REHEARING
AND REARGUMENT

To the Honorable, the Supreme Court of the Territory of Hawaii, and the Justices Thereof:

Come now the appellants herein and respectfully petition for a rehearing and reargument of these causes on the following grounds:

I.

It is respectfully urged that the Court, in denying relief, did not give consideration to the facts alleged in the verified motion to vacate the appointment of the guardian, to hold further hearings or to remove the guardian. In the absence of a hearing on the merits, the facts alleged in the verified motion, and the offers of proof made on the return day of the motion, must, for the purposes of these cases, be taken as true. The return to the motion merely recites the proceedings theretofore had in the cause, and denies that the Hawaiian Trust Company has conflicting interests or is an unsuitable guardian.

The Court states that the underlying relief sought was to have previously determined issues reheard for the sole purpose [112] of discharging the guardian. This statement distorts the essential purpose of the motion, which was to permit the taking of

further and additional testimony and evidence necessary to a fair determination of the issues raised by the petition, and not before the court at the time the guardian was appointed.

No stronger case could be made, commanding relief from an unjust decision, than appears from the verified motion, the denial of which is covered by the appeal in No. 2761.

This verified motion, as appears from the face of the motion, proceeds on the ground that the original order was entered without the court being fully apprised of the facts, and upon certain fraudulent representations and concealments of material fact, as a result of which a full and fair hearing had not been had. The motion and offers of proof made on the return day of the motion show among other things:

1. That the alleged incompetent had been examined by a reputable alienist, who found her competent to select the person she desired to manage her affairs.

2. That the motives of the two petitioning sisters, who sought to have Hattie Kulamanu Ward declared incompetent, were suspect for reasons fully set forth in the verified motion.

3. That the Hawaiian Trust Company had conflicting interests which made it an unsuitable guardian.

4. That the alleged incompetent's property was and had been properly cared for by a person chosen by her, she having, according to proffered evidence,

competence to select the person she wished to assist her.

5. That the appointment of the Hawaiian Trust Company [113] as guardian would change the management of the family corporation, and that by so appointing the nominee of the two petitioning sisters, the Hawaiian Trust Company, the court was taking sides in a family dispute without any knowledge of the facts or merits of the respective sides in said dispute, and was not only depriving the alleged incompetent of the right to manage her property and estate or select whom she desired to manage it, but was also effectively robbing the two sisters who opposed the petition—because of the unique circumstances shown in the petition—of the right to manage their own property, or to have it managed by an impartial person or trust company not antagonistic to them and to their interests, and not committed to a course of action against their wishes.

On the basis of these showings alone, it would seem that the very minimum that equity and justice would require is that the court remain neutral in the family dispute and appoint a neutral or impartial person or agency and not one antagonistic to, or one committed to a course of action advisable to one side of the dispute, and to that end should have permitted the taking of further testimony to be fully advised as to the necessity for the appointment of a guardian, and as to the suitability of the guardian chosen, under the facts and circumstances.

Appellants in their briefs cited numerous author-

ities showing that the refusal of the judge below was error as a matter of law and an abuse of discretion.

Thus, in *Matter of Lamoree*, 32 Barb. 122, 124, cited with approval in *In re Rothman*, 188 N. E. 147, the New York Court of Appeals said:

Considering the close and intimate relations which the committee must maintain with the family and relatives of the lunatic, his power of control [114] —all but absolute—over his person and property, the remote possibility of his ever being in a condition to make any disposition of his estate which shall prevent its descent and transmission to the heirs at law and next of kin, a rule of practice or of positive legislation which would justify the appointment of a stranger to execute the trust of committee, without the assent and against the will of his family or other relatives, and without any sufficient or adequate cause, would be oppressive and intolerable.

and in *Re Colvin*, 3 Md. Ch. 206, the court held:

And accordingly, though it most frequently happens that the committee is appointed on the nomination of the person who sues out the commission of lunacy, a caveat may be entered against the person so nominated, and when this is done, the recommendations of the parties interested will be considered, and proof taken to aid the Court in making a selection. This is the established practice, and the propriety of it is apparent.

When, as it appears here, that the alleged incompetent has resided all her life with her sisters, Lucy and Kathleen, and that because of the joint property owned by them, and their ownership of stock in the family corporation, the affairs of all three were inextricably intertwined, it seems, in the words of the New York court, oppressive and intolerable to force a guardian unsatisfactory to these two on them, when because of the unique property situation they cannot do as they see fit with their own property without the consent of the guardian.

II.

It is respectfully urged that the Court erred in reaching the conclusion that the Seventh Amendment does not guarantee to persons resident in the Territory of Hawaii the right to a jury trial on the issue of sanity and hence that Section 12509 of Revised Laws of Hawaii is valid and not in contravention of this Amendment. [115]

The Court, after noting that the United States Supreme Court has not specifically passed on this question, states that appellants have cited no clear authority of a lower court holding that a jury trial is a constitutional right in courts of the United States, including the District of Columbia and courts of the territories. On the contrary, it is respectfully shown that the federal cases which consider the problem all reach the conclusion that a jury trial of the issue of competency in such courts must be had before a person can be deprived of his liberty and property.

Thus, in *Hager v. Pacific Mutual Life Insurance Co.*, 43 F. Supp. 22, the court said:

I do not believe that under our Federal and State Constitutions a person can be declared incompetent and have his property taken out of his hand or be placed in confinement without the intervention of a jury and the verdict of a jury declaring him to be non sui juris. It seems to me that the statute is repugnant to our whole constitutional system.

The very fact that a person is insane or charged with being insane is equally as great if not even a greater reason to make the trial public and before a lawfully constituted jury than in the case of a person charged with crime. Nor should there be permitted a waiver of jury. Possibly without reason or capacity to properly select counsel or to defend himself a provision to permit a waiver of rights seems improper and on the same plane with the provision in Section 216aa-74 that he may demand a jury, which in my judgment is void.

In *In re Bryant*, 3 Mackay 489, 493-494 (Sup. Ct., D. C.) the court held that in the District of Columbia a jury trial was required before a person could be declared or held as a lunatic.

The court said:

This deprivation of the liberty of a citizen upon the ground of lunacy is a matter of very grave importance, because it may easily [116] happen that for fraudulent purposes, perhaps

with a view to deprive a person owning property of his control over it, a perfectly sane man might be sent to an asylum by his relations, upon a certificate of two physicians, and be illegally confined there for years.

We hold, therefore, first, that these sections of the Revised Statutes do not contemplate compulsory seclusion in this institution without due process of law. They only open its doors to those who have been properly found to be insane persons. If they meant anything else they would be unconstitutional.

And, secondly, we hold that the whole matter of the care of insane persons is regulated by the act of Maryland of 1785, which includes this proceeding of an inquiry by jury.

And in *Burke v. Wheaton*, Fed. Case No. 2165, 3 Cranch C. C. 341, the court held that the mode of ascertaining who are lunatics is by jury trial upon the issuance by the court of a writ de lunatico inquirendo.

The Court concedes that Section 12509 is in derogation of the common law, thus agreeing with petitioners that at common law the method of declaration of incompetency differed from our statute in that it could be had only after a jury determined the issue of competency.

The first ten amendments to the Constitution of the United States, known as the Bill of Rights, were proposed by the First Congress at the insistence and demand of the people that personal rights

and liberties established by common law at the time of the adoption of the Constitution could never be taken away or infringed upon by the federal government. Among these rights was the right to a jury trial in civil cases as it existed at common law. Even Congress cannot, by laws purporting to set up different legal remedies, deny persons the right to a jury trial as it existed at common law. *Raytheon Mfg. Co. v. Radio Corporation of America*, [117] 76 F. (2d) 943, affirmed 296 U. S. 459, 80 L. Ed. 327.

The Seventh Amendment did not enlarge or abridge the right of jury trial as it existed at the time of the adoption of the Constitution. It guaranteed its preservation as it existed at common law in proceedings of a legal as distinguished from an equitable character. *Fitzpatrick v. Sun Life Assurance Co. of Canada*, 1 F.R.D. 713.

While it is true that the appointment of a guardian is rested in the chancellor, the determination of the fact of competency was at common law established as the function of a jury, and only after determination of this issue by a jury could the chancellor appoint a committee.

See *Hamilton v. Traber*,

27 Atl. 229.

Shumway v. Shumway,

2 Vt. 339.

Thus, in *Matter of Perkins*, 173 N.Y.S. 520 at 523, the court held:

In insanity case, the alleged insane person is entitled to a trial of the question of fact, not

only by the statute, but as a constitutional right. Jurisdiction over lunacy cases was originally exercised by the Court of Chancery, and the custom prevailed on the part of the chancellor, before the Constitution was adopted, to require a trial by jury of the question of the insanity of a person, and therefore that was one of the cases where jury trials were preserved by the Constitution.

To determine what civil proceedings require determination of facts by the jury, the Supreme Court has said that we must look to the law as it existed at the time the Constitution and the amendments thereto were adopted.

There can be no question that only a jury could at common law find an individual insane, and that such a finding of insanity was a condition precedent to the appointment of the guardian of the person and property. See cases cited in appellants' [118] Opening and Reply Briefs and Supplemental Memorandum.

When either the state or the relatives of a supposed insane person attempt to deprive the supposed insane person of his liberty and the right to manage his property, there can be no doubt that the proceeding is an adversary proceeding, depriving such a person not only of the management of his property, but also the right to dispose of it as he sees fit by will. There is a value in controversy in such proceedings in the same manner as there is a value in controversy in will contest suits and

other proceedings tried by juries at common law.

See *Shumway v. Shumway*,

2 Vt. 339.

State ex rel Finch v. Duncan,

193 S. W. 950, 954.

The Court, in denying the right to a jury trial in the Territory pursuant to the Seventh Amendment, reaches a conclusion not supported by the common law that the verdict of a jury on the issue of sanity was advisory in nature. All the authorities show clearly that a judge at common law could not set aside the finding of a jury or ignore its decision, and hence reach a different conclusion. His power, as in all other law action, was merely to set aside the verdict and direct a new trial for errors in the record.

See cases cited in Opening and Reply Briefs and Supplemental Memorandum.

While it is true that the Supreme Court has not directly passed upon the question of the necessity of a jury trial to determine competency, the Supreme Court has exhaustively examined the nature of the rights guaranteed by the Seventh Amendment. [119]

In *Parsons v. Bedford*, 3 Peters 433, 446, 7 L. Ed. 732, Mr. Justice Story said:

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every

State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise reexaminable in any court of the United States, than according to the rules of the common law." At this time there were no States in the Union the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no States were contemplated in which it would exist. The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The Constitution had declared in the third article, "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority,"

etc., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law they meant what the Constitution denominated in the third article "law"; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there [120] were few, if any, States in the Union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment, then,

may well be construed to embrace all suits which are not equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, ch. 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided that "the trial of issues in fact in the district courts in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury"; and in the twelfth section it is provided that "the trial of issues in fact in the circuit courts shall in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury"; and again, in the thirteenth section, it is provided that "the trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury."

But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. "No fact tried by jury shall be otherwise reexaminable in any court of the United States than according to the rules of the common law." This is a prohibition to the courts of the United States to reexamine any facts tried by a jury in any other manner. The only modes known to the common law to reexamine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was

properly returnable; or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings.

The conclusion seems inescapable from this discussion that the right to trial by jury of the issue of sanity was preserved and guaranteed by the Seventh Amendment. The determination of the issue of sanity at the time of the adoption of the Seventh Amendment was not an equitable proceeding with an advisory jury, but was a proceeding governed by the common law [121] which required the verdict of a jury which was final and binding before the chancellor could appoint a committee. This has been the mode consistently followed in the courts of the District of Columbia.

It is respectfully submitted that Section 12509 deprives the alleged incompetent in this case of an absolute right to the verdict of a jury before she could be deprived of her property, and that the procedure set forth by 12509 denies due process of law and the right to a jury trial in violation of the federal Constitution.

III.

It is respectfully urged that the Court erroneously failed to consider on the merits the questions presented under the writ of error by the first six assignments of error. In this respect, the Court's decision is inconsistent with the decision it reached in respect to the equitable nature of guardianship proceedings. The Court grounds its refusal to con-

sider these assignments of error on its assertion that the alleged errors were not called to the attention of the judge at the time and made the subject of objections and exceptions.

It has been settled law in the Territory of Hawaii that objections and exceptions are not necessary in proceedings of an equitable nature, and that errors apparent on the face of the record may be corrected by writ of error regardless of the taking of exceptions.

Thus, in *Cummings v. Iaukea*, 10 Haw. 1, the Court disposes of the contention that defects apparent on the record on the writ of error must be raised below by demurrer or exception. In that case, this Court said: [122]

But, even if no exception had in fact been taken to the overruling of the demurrer, or if the demurrer had not been interposed at all, a writ of error on the point of the alleged misjoinder could have been sued out within six months from the rendition of judgment if the judgment had not been satisfied.

The counsel for the plaintiff in error is under the impression that in order to avail himself of a writ of error he must have raised the point in the Court below and perfected his exceptions, if not sustained. This is not the law. "Any error appearing on the record, either of law or fact, or any cause which might be assigned as error at Common Law," may be corrected by writ of error. * * *

It was competent for plaintiff in error to

have petitioned for his writ, within the statutory time, even though he had demurred, and even if he had not demurred and the record did not state that the demurrer had been argued and decided against him and that he had excepted to the ruling. * * *

Moreover, as appears from the transcript of the proceedings, appellants' objections were through Mr. Cass made known to the judge during the course of the hearing.

The first six assignments of error raised serious questions as to the correctness of the decision below, here sought to be reversed.

These assignments are set forth on pages 32-33 of Appellants' Opening Brief, and the authorities which show error was committed by the court in his rulings on these matters are discussed on pages 35-52 of Appellants' Opening Brief and Appellants' Reply Brief, pages 7-12. These portions are hereby incorporated by reference in this petition, with the request that the Court consider them on the merits. [123]

IV.

It is respectfully urged that the Court erred in holding that there was not an abuse of discretion in the denial of the motion to vacate the appointment of the guardian or to remove the guardian. Appellants in their briefs cited cases involving closely analogous facts where courts have universally refused to uphold lower courts in appointing guardians, under facts similar to the facts and

circumstances here. It is inconceivable that a court should foreclose, without full knowledge of the facts and full and fair hearing, the right of the alleged incompetent Hattie Kulamanu Ward to manage her property or to select her own manager without the court hearing proffered testimony of a reputable alienist that she had the capacity to choose whom she desired to manage her property. It is equally inconceivable that a court should refuse to hear testimony concerning the related interests of the alleged incompetent with Lucy and Kathleen Ward before foreclosing their right to have a fair and impartial guardian appointed, one not antagonistic to their interests and committed to a course of action affecting their property as well as the alleged incompetent against their wishes. Not only does it appear that the control and management of the property and estate of Hattie Kulamanu Ward effectively gave to the trustee of her estate the power to change the control and management of the corporation, but it also appears that the appellants Lucy K. Ward and Kathleen Ward and the alleged incompetent Hattie Kulamanu Ward owned substantial properties jointly with rights of survivorship, namely, the premises known as the Old Plantation, comprising 23 acres of valuable land in the heart of [124] the City of Honolulu, including business property. Thus, by appointing a trustee unacceptable to these two persons, these sisters were deprived not only of their right to manage the family corporation, but also of their right to manage property belonging to them in which

the petitioning sisters had no interest whatsoever. Again it seems that the very least that could be expected of a court would be the appointment of an impartial person as guardian.

That the wishes of Lucy K. Ward and Kathleen Ward were made known to the judge during the original proceedings is clear from the transcript, when through their attorney, they asked the court, after his refusal to consider either of them as trustees, to appoint any other trust company than the one nominated by petitioners, and appointed by the court. No fairer attitude could have been manifested on their part, and under the facts and circumstances, it would seem that justice and equity would have required the court to follow this course, particularly in view of the joint holdings of the three sisters which made harmonious relations with the appointed guardian essential in order to preserve to Lucy K. Ward and Kathleen Ward, about whose competency there was no question, the right to manage their property as they saw fit.

V.

It is respectfully urged that the Court reads into and construes Section 12529 in a manner inconsistent with the language of that section. While it is true that Section 12529 is prospective in operation, appellants, in so far as [125] their motion to remove the guardian is concerned, sought only prospective operation. In their motion appellants alleged the unsuitability of the trustee on the ground of conflicting interests, which conflicting in-

terests were spelled out in the petition. Section 12529, by its terms, does not limit the time at which removal may be sought. The allegations in the verified petition of conflicting interests clearly make out a case of unsuitability. It is one of the most basic principles of guardianship and trusts that no guardian be appointed whose interests may be conflicting. The inconsistency of the lower court in holding as a matter of law that Lucy K. Ward and Kathleen Ward, most of whose property was owned jointly with the alleged incompetent's, had conflicting interests, while the Hawaiian Trust Company, which engaged in the same kind of business in respect to the management of property as Victoria Ward, Limited, did not have such conflict of interests is apparent. It is respectfully urged that the allegations of conflicting interests of the guardian set forth in the verified motion meet the statutory requirements of 12529 and set forth facts showing the unsuitability of the guardian. Appellants therefore request that the court consider on their merits the assignments of error, 7-10, covering the unsuitability of the trustee, and in that connection to reconsider the authorities discussed on pages 52-63 of their opening brief and pages 12-14 of their closing brief incorporated herein by reference.

VI.

It is respectfully urged that the court too narrowly construed the relief sought by the verified motion. The [126] verified motion clearly requests a reopening of the hearing for the purpose of tak-

ing additional testimony, so that the court could be fully advised of all the facts and circumstances, and could make a just decision in the light of facts and circumstances not brought to his attention or considered by him in the original determination of issues. While it is true that the issues of the petition remained the same, the verified motion sought to bring to the attention of the court new facts and circumstances. When it is considered that the motion was promptly filed after the original hearing, and that it sets forth essential and relevant facts necessary to a fair determination of the issues, it was an abuse of discretion not to permit further evidence to be adduced.

No harm could come to anyone, including the petitioning sisters and Hawaiian Trust Company, to have the determination made by the court after being fully apprised rather than at a time when the court was advised only as to the wishes of the two petitioning sisters, and was not fully advised of the interwoven property interests of the alleged incompetent and Lucy K. Ward and Kathleen Ward. When the serious nature of incompetency proceedings is considered, it seems that a court should do everything in its power to see that it is fully advised of all the facts and circumstances before making a decision. It is universally held that statutes providing for the appointment of guardians shall be administered with utmost caution. See *Danner v. Bever*, 42 A (2d) 747 (Pa., 1945).

VII.

It is respectfully urged that the court did not give due consideration to the assignment of error charging a denial [127] of due process of law from the evident bias and prejudice of the lower judge against Lucy K. Ward, as indicated by his intemperate and injudicious remarks as to her character and motives, where the record indicated no factual basis for the charges made. It would seem to be the duty of this court to discourage the vituperative abuse of petitioners to the court and to firmly discourage irascibility and intemperance of judicial behavior, particularly where, as here, the bias and prejudice indicated is so strong as to make apparent from a casual observation of the transcript that the judge, from some source outside the record, was so prejudiced against Lucy K. Ward as to be unable to accord her an impartial hearing. While a motion for rehearing is discretionary with the trial judge, every litigant is entitled to an impartial tribunal, and where by his conduct a judge shows inability to accord a fair and impartial hearing, there is a denial of due process of law.

Wherefore, appellants pray that a rehearing and reargument be had, and this Court reconsider its decision in view of the law and the facts set forth in the petition.

Dated at Honolulu, T.H., this 3rd day of April, 1951.

Respectfully submitted,

BOUSLOG & SYMONDS,

By HARRIET BOUSLOG,
Attorneys for Appellants.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith.

/s/ HARRIET BOUSLOG.

Certified true copy.

[Endorsed]: Filed Supreme Court, T.H., April 3, 1951. [128]

In the Supreme Court of the Territory of Hawaii

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU WARD,

An Incompetent.

Nos. 2761 and 2762

[Title of Cause.]

DECISION ON PETITION FOR REHEARING

Filed April 3, 1951.

Decided April 18, 1951.

Le Baron and Towse, JJ., and Circuit Judge Corbett in Place of Kemp, C. J., Retired.

Per Curiam. This is a petition for rehearing of the cause determined by this court's opinion as recorded at page 39, ante. It rests upon seven grounds constituting in effect a reargument of the previously determined cause. As such, they are argumentative in character and repetitive of matters heretofore fully briefed and argued by counsel at the hearing on appeal and thereafter fully considered by this court. No useful purpose, therefore, would be served by setting forth such grounds. Suffice it to say that this court on review of its opinion with respect to the petition's grounds and reargument finds nothing therein to warrant a rehearing of the cause. [129]

Petition for rehearing denied without further argument.

Harriet Bouslog for the petition.

By the Court:

/s/ GUS K. SPROAT,
Clerk.

Approved:

/s/ LOUIS LE BARON,
Associate Justice.

/s/ EDWARD A. TOWSE,
Associate Justice.

/s/ GERALD R. CORBETT,
Circuit Judge in Place of
Chief Justice, Retired.

Certified true copy.

[Endorsed]: Filed Supreme Court, T.H., April
18, 1951. [130]

In the Supreme Court of the Territory of Hawaii

No. 2761

Appeal from the Circuit Court, First Judicial Circuit, the Honorable Albert M. Crisy, at Chambers in Probate Proceedings. Probate No. 15530.

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULAMANU, WARD,

An Incompetent.

DECREE ON APPEAL

Pursuant to the opinion of the Court filed February 5, 1951, the orders appealed from are affirmed.

Dated: Honolulu, Hawaii, May 5, 1951.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ EDWARD A. TOWSE,
Justice.

Certified true copy.

[Endorsed]: Filed Supreme Court, T.H., May 5, 1951. [132]

In the Supreme Court of the Territory of Hawaii
No. 2762

Error to the Circuit Court, First Judicial Circuit,
the Honorable Albert M. Cristy, at Chambers
in Probate Proceedings. Probate No. 15530.

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULA-
MANU WARD,

An Incompetent.

JUDGMENT ON WRIT OF ERROR

Pursuant to the opinion of the Court rendered
February 5, 1951, the orders appealed are affirmed.

Dated: Honolulu, Hawaii, May 5, 1951.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ EDWARD A. TOWSE,
Justice.

Certified true copy.

[Endorsed]: Filed Supreme Court, T.H., May 5,
1951. [134]

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

No. P-15530

In the Matter of:

THE GUARDIANSHIP OF HATTIE KULA-
MANU WARD,

An Incompetent.

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled
cause before the Honorable Willson C. Moore, Cir-
cuit Judge.

December 14, 1948

Appearances:

J. GARNER ANTHONY, ESQ.,

Appearing on Behalf of the Petitioner.

GILBERT E. COX, ESQ.,

CARLSMITH & CARLSMITH,

Appearing on Behalf of Lucy Ward. [135]

Mr. Anthony: I appear for the petitioners in
this case, petitioning for the appointment of a
guardian.

Mr. Cox: In this matter, may the name of
Carlsmith & Carlsmith, representing Lucy K. Ward,
appear in the record?

The Court: The appearance may be shown.

Mr. Cox: Gilbert E. Cox, associate, appearing at
this time for the firm.

Mr. Anthony: Ready to proceed, your Honor. I don't know that there can be an appearance of a person other than the incompetent. That is a little anomalous.

The Court: What about this incompetent? Has there been a guardian ad litem appointed?

Mr. Cox: No, your Honor.

The Court: Where is this woman?

Mr. Anthony: At the Old Plantation, a few hundred yards from the courthouse here.

The Court: That is a long hundred yards.

Mr. Anthony: I say a few hundred yards.

The Court: It seems to me—here is a property valued in excess of \$500,000. That is a lot of money.

Mr. Anthony: That's correct. That's why we think a guardian should be appointed. The evidence will show that she is incompetent to handle her business affairs.

The Court: I think it would appear to the court, in a situation like that, where there is that amount of money involved that the court should, out of the abundance of caution, or out of some caution, at least, have a guardian ad litem appointed to represent the person who is alleged to be [137] incompetent.

Mr. Cox: Of course, that is entirely agreeable. I don't think that is a requirement of the statute. There is no jurisdictional requirement.

Mr. Anthony: No, but Mr. Cox represents the **sister; not the incompetent.**

Mr. Cox: Not the incompetent, but one who has entered in the petition.

The Court: Of the Ward family in the courts, of my own knowledge of the situation, there has been considerable litigation in which they are involved. I think in order to protect—you might say—the court in this situation, that the court believes before any proceeding of this kind has gone to a hearing, that there should be a guardian ad litem, especially when there is that much involved, to represent the interest of the one who is alleged to be incompetent.

Mr. Anthony: May I ask counsel, you are appearing in this case, you are resisting the petition, Mr. Cox?

Mr. Cox: For the record, your Honor, we were retained in this matter about twenty-four hours ago by Miss Lucy K. Ward, who, I still contend, has an interest in this petition. Having been named as attorney in fact we are asking a continuation of the matter for the simple reason that we have not been able to discuss the matter with Lucy K. Ward or any others who might be of interest in the matter.

The Court: Lani W. Booth and Mellie E. Hus-tace are sisters?

Mr. Anthony: That's correct.

Mr. Cox: I believe there is another one. [138]

Mr. Anthony: There are five sisters altogether.

The Court: We have got four in the picture now.

Mr. Anthony: Two petitioners and the alleged incompetent.

The Court: Well, I don't know. Of course, I don't know the position of Miss Lucy K. Ward

in this, but I do believe, and I think it would be a very proper step in a situation of this kind where there are members—two sisters on one side and a petitioner on the other side, making an appearance, that we should have a guardian ad litem appointed to represent the interest of this person who is alleged to be incompetent.

Mr. Anthony: May I just revert to the statute a minute, your Honor, to see what we should do under those circumstances?

The Court: I know that there have been a number of matters of this kind in which a guardian ad litem has been appointed. There is an allegation in this petition here that the business of this alleged incompetent has been handled by Lucy K. Ward, who comes into the picture here through her attorney. Of course, if she holds a power of attorney from this woman, she might well be interested.

Mr. Anthony: The only record for the appointment of a guardian ad litem is contained in Sections 12507 and 12509, of the Revised Laws. 12507 has to do with the appointment of a guardian ad litem for a minor. 12509, which relates to the guardianship of incompetents, provides:

“When the relations or friends of any insane person shall apply to any of the judges hereinbefore mentioned to have a guardian appointed for such person, the judge shall cause notice [139] to be given to the supposed insane person of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed. The judge shall

also cause notice to be given to the husband, wife, parent, or any child or children of the supposed insane person, if any there be residing within the jurisdiction of the court.”

There is no such person to answer that description.

“In case it shall appear by return of the summons or by affidavit to the satisfaction of the judge that no such person can be found——”

Namely, husband, wife, child, etc., just recited.

“——the judge may appoint a guardian ad litem to protect the interest of the supposed insane person and cause such notice to be given to such guardian ad litem.”

So your Honor has full power to do what your Honor suggests. Then it goes on to say:

“If after a full hearing it shall appear to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both with the powers and duties hereinafter specified, and, in the case of the appointment of a guardian ad litem, provide for the compensation and reasonable and necessary expenses of such guardian ad litem.”

The Court: I feel that a guardian should be in a case that involves as much property as this, and in view of what the court can foresee from two parties coming in here, that it is liable to end up in quite a contest. I think that it would be very

proper, and the court feels that a guardian ad litem should be appointed. [140]

Mr. Anthony: Very well——

The Court: And in this particular regard, the court feels that the guardian ad litem should be an attorney that may act as such guardian in any way necessary to protect the interest of this alleged incompetent.

Mr. Anthony: Very well, then. Would your Honor make an appointment?

The Court: I can't make it right off-hand. I have been running through my mind the available people while I have been talking. There are several attorneys——

Mr. Anthony: I can present an order for your Honor's signature?

The Court: Yes.

Mr. Anthony: Leaving the name blank.

The Court: You can present the order and leave a blank to fill in. When you present your order—I think in the next twenty-four hours—the court can select one.

Mr. Anthony: I would like to have the court fix the time of the hearing on this. There are very substantial properties involved here. There should be a prompt determination.

Mr. Cox: I should like to point out, in view of the remarks that you have made upon the amount of property involved, and as Mr. Anthony has just also mentioned, the words of the statute with regard to a full hearing, that should be given full consideration in this matter. There is one other situa-

tion involved. Katherine Ward, who is not represented by counsel, although I know that she wished——

The Court: I might say on the point of the [141] guardian ad litem, I imagine the guardian ad litem would want some time at least to make a cursory investigation as to what the situation was.

Mr. Anthony: Of course, he would have to.

The Court: You could not very well appoint one and say that you want to hear it this week.

Mr. Anthony: Well, I didn't expect that. But I would like to get it heard fairly soon, though.

The Court: I would suggest that we might hear it—we might continue the hearing of this case, subject to being continued if the guardian ad litem appointed, or any other party would make a justifiable representation that he needed more time. You might make a setting some time between Christmas and New Years, during that week. There is approximately half of this week gone. We all know that during next week that lawyers and various other people with the Christmas spirit don't feel too inclined to get tangled up in legal matters.

Mr. Anthony: I think that is a good suggestion.

Mr. Cox: It might be possible to put that in the first week of January, in view of the holiday season, in view of the large number of interested parties in this matter.

Mr. Anthony: We don't even know whether there is going to be anybody in this case, other than the guardian ad litem at this point.

The Court: Let's see, today is the 14th. A continuance to the 28th. That would be two weeks.

Mr. Anthony: That's agreeable, your Honor.

The Court: That is what it would amount to. You [142] say that you just got in touch with your client?

Mr. Cox: Yes.

The Court: Are you going back to Hilo today or tomorrow?

Mr. Cox: No. I am not going to be in the city here most of the week. I will go back to Hilo tomorrow.

The Court: I would suggest when Mr. Anthony prepares his order for the appointment of the guardian ad litem, that you make an extra copy of that, so that Mr. Cox may have that and he will know who the guardian ad litem is. Then it might be necessary, or you might find it a good thing, after conversing with your clients—some of these cases are disposed of in more or less an amicable manner, all parties concerned get together or try to get together and find out what is to be done.

Mr. Anthony: I was going to make the suggestion, if after investigation by Mr. Cox—he should not be pressed to state his position until he has made an investigation—he and the guardian ad litem, if they can conclude that they can agree that the prayer of the petition should be granted, we could have this matter disposed of even prior to the 28th.

The Court: Of course, if there is no contest, it means a matter of ten or fifteen minutes, where, if

it is a contest, it may be a matter of ten days or two weeks. It will stand continued at this time until the same hour on December 28th. The case will go ahead and proceed at that time unless there is good cause shown here that it should not then proceed.

Mr. Cox: Thank you very much. When may we expect the appointment? [143]

The Court: Whoever is guardian ad litem will be appointed by noon tomorrow, not later than noon. I keep a list in here of all the attorneys. I would like to go through that list. Some have gone through my mind as being quite appropriate. But I may go through the list and find somebody that is more appropriate.

Mr. Anthony: Your Honor, just to make——

The Court: I might say this: Is there any particular attorney or attorneys that anybody has any violent objection to?

Mr. Anthony: I think we would be satisfied with anybody selected by this court.

Mr. Cox: I think that is correct.

Mr. Anthony: Your Honor, may I make one suggestion, knowing a little bit about this family, that Mr. Cox should advise his client that the ward or the alleged incompetent will be visited by the guardian ad litem.

The Court: Certainly.

Mr. Anthony: Just so that we have no difficulty.

Mr. Cox: I understand.

The Court: Of course, you must advise your client that the guardian ad litem will have to be

permitted to see the alleged incompetent, because he is——

Mr. Cox: I understand that, your Honor. I will do that.

The Court: I don't know, Mr. Anthony, on this competency. Have any doctors been taken into consultation on this point? [144]

Mr. Anthony: It is not a question of medical testimony, your Honor.

The Court: I thought if there had been, it might be well that the doctor or such person be directed to give a full report to the guardian ad litem. That is the only thing I was thinking of.

Mr. Anthony: We have no such report, your Honor. May I have that hour again?

The Court: At 1:30 on December 28th. If there is a contest, gentlemen, just keep in mind that we could have the pro forma matters, and the contest hearing at the end of the calendar.

Mr. Anthony: Thank you very much.

Mr. Cox: Thank you.

(At this time the court continued the matter until December 28, 1948, at 1:30 o'clock [145] p.m.)

First Circuit Court,
Territory of Hawaii—ss.

I, Sidney H. Minns, shorthand reporter for the Territory of Hawaii, do hereby certify that I reported in shorthand the proceedings had in the matter of the guardianship of Hattie K. Ward, an

incompetent person, before the Honorable Willson C. Moore, Circuit Judge, on December 14, 1948, that I transcribed the same, and that the transcript hereto annexed is a true and correct transcript of my shorthand notes so taken.

/s/ SIDNEY H. MINNS.

Honolulu, T.H., February 25, 1949. [146]

December 28, 1948

E. F. COLLINS, ESQ.,

Of Messrs. Smith, Wild, Beebe & Cades,
present.

The Court: This is a petition for the guardian of the estate of Hattie Kulamanu Ward.

Mr. Collins: I spoke to Mr. Anthony about this matter, and as I recall I spoke to the Court. We are having an examination made of the ward.

The Court: Yes, you are the one who was appointed guardian ad litem in this case.

Mr. Collins: Yes.

The Court: And you say that the examination has not been completed?

Mr. Collins: The examination has not been completed, and the doctors advise us that it will take approximately three weeks to complete the examination. I spoke to Mr. Anthony and also to the attorney for the appointee with the power of appointment, and both attorneys have agreed that

this [147] matter should go over for three weeks, or be taken off the calendar.

The Court: This is December the 28th?

Mr. Collins: Yes, sir.

The Court: All right, I will continue this for a period of three weeks, which will be January the 20th, 1949, and that will come before Judge Cristy.

(Adjourned.)

I Hereby Certify the above and foregoing, 2 pages of transcript, to be a full, true and correct transcript of my shorthand notes taken on December 28th, 1948, at the place as herein set forth.

/s/ R. N. LINN,
Official Reporter.

Honolulu, T.H., April 22, 1949. [148]

January 13, 1949

Before the Honorable Albert M. Cristy, Second
Judge, Honolulu, T.H.

Appearances:

J. GARNER ANTHONY, ESQ.,
Of Robertson, Castle & Anthony,
Representing Petitioners.

PHIL CASS, ESQ.,
Representing Miss Kathleen Ward.

WENDELL CARLSMITH, ESQ.,

Of Carlsmith and Carlsmith, Hilo, Hawaii,

Representing Miss Lucy Ward.

J. EDWARD COLLINS, ESQ.,

Of Smith, Wild, Beebe and Cades,

Guardian Ad Litem. [149]

Upon the Clerk calling the case, the following proceedings were had:

Mr. Anthony: I might make a brief statement.

Mr. Cass: May I enter my appearance for Miss Kathleen Ward?

Mr. Carlsmith: May I enter the name of Carlsmith and Carlsmith for Miss Lucy Ward?

The Court: And Mr. Collins as guardian ad litem.

Mr. Collins: That's right, your Honor.

Mr. Anthony: If the Court please, this petition was filed on November 23rd. It was duly served on the alleged incompetent as appears by the order and the return on file, and upon the return day before Judge Moore, I believe Mr. Carlsmith or a representative from his office entered their appearance, and Judge Moore at that time stated that he thought in the interest of all concerned he should appoint a guardian ad litem.

The Court: I have read the minutes.

Mr. Anthony: I didn't know your Honor had. In any event, we forwarded a copy of the petition and order to Mr. Collins, the guardian ad litem,

who appeared in the case and undertook to make an investigation on behalf of the alleged incompetent. We are ready to proceed with our proof, and I think the guardian ad litem will have a report to submit to the Court. Shall I proceed with the evidence?

The Court: Proceed.

Mr. Anthony: Mrs. Booth, please take the witness stand. [150]

MRS. LANI BOOTH

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please?

A. Lani Booth, or should I give the whole name?

Q. That is good enough. Mrs. Booth, you were born in the Territory, were you?

A. Yes, I was.

Q. And you have sisters who are living here in Honolulu, have you? A. Four sisters.

Q. Who are they?

A. Mrs. Mellie Hustace, Miss Kulamanu Ward, Lucy Ward and Kathleen Ward.

Q. Approximately how old is Kulamanu Ward?

A. About 70. She will be 70 this year.

Q. Incidentally, which one is the oldest?

A. Mrs. Hustace. She will be 82 this year.

Q. Your sister Hattie Kulamanu Ward, just briefly tell the Court how well you know her.

(Testimony of Mrs. Lani Booth.)

A. I practically spent my life with her, and I think I know her likes and dislikes even better than she does.

Q. Mrs. Booth, you are petitioner in this case requesting the appointment of a guardian of the property of Hattie Kulamanu Ward, are you not?

A. Yes, I am.

Q. Upon the ground that she does not have sufficient [151] mental capacity to take care of her property and affairs?

A. Yes, absolutely.

Q. Will you please state to the Court upon what you base that allegation of her mental and physical incapacity?

A. She has grown very forgetful with her years, and when she has been told to do anything, unless you are right there with her, she immediately forgets. She can't keep it in her mind more than five or ten minutes at a time.

Q. How long has that situation continued, Mrs. Booth?

A. It started before my mother's death in 1935.

Q. 1935? A. 1935.

Q. Do you know whether or not she has the ability and capacity to conduct any business affairs?

A. No, absolutely not; she couldn't do it.

Q. She couldn't do it? A. No.

Q. Does she know how to look after the assets of her estate? A. No, she has never done that.

Q. When you say she is forgetful, will you give

(Testimony of Mrs. Lani Booth.)

the Court some brief examples of her lapses of memory?

A. When she has answered the telephone she seems to know who she is talking to at the time, but immediately upon leaving the telephone, from here to the chair, she has forgotten the party entirely.

Q. Have you asked her whom she is talking to?

A. I have asked her whom she is talking to and she doesn't remember.

Q. What occurs when she goes out, first when she is getting [152] dressed. Will you give some examples to the Court about that situation, when she gets dressed? Do you ever go out with her?

A. I used to, but now now.

Q. Not lately? A. Not lately.

Q. Does she know where she is going?

A. She will always ask where she is going, and unless we are with her right while she is dressing, she will ask all the time she is dressing, which usually takes quite a little while, where we are going and why we have to go; but she has forgotten all the answers we have given her previously.

Q. Does she read the newspapers?

A. She reads the newspapers, and it is usually one article from first to last. She forgets everything else. She even forgets she has read that article.

Q. Does she read it out loud at times?

A. Yes, if there are people around to listen to her, and when you tell her she has already read that, she doesn't remember it.

(Testimony of Mrs. Lani Booth.)

Q. She is the owner of substantial property within the jurisdiction of this Court, is she not?

A. Yes.

Q. Stocks and bonds and certain real estate?

A. Yes.

Q. And that requires somebody that has legal capacity to manage?

A. I should think so, yes. I have had to have it done for myself and I don't own nearly half [153] that.

Q. I see. You are satisfied that your sister, Kulamanu, is not competent to manage her property affairs? A. Definitely not competent.

Q. Do you know whether or not her business is conducted by an attorney-in-fact?

A. Yes, it is conducted by sister Lucy.

Q. And you have asked that the Hawaiian Trust Company be appointed guardian in the event the Court finds incompetency to exist? A. Yes.

Q. Where is Miss Kulamanu Ward living at the present time? A. At the old home.

Q. Right here in Honolulu?

A. Old Plantation.

Q. You live right next door, do you?

A. Right on part of the property, in my own home.

Q. Who lives with Kulamanu?

A. Lucy and Kathleen.

Q. They are both sisters? A. Sisters.

Mr. Anthony: No further questions.

Mr. Collins: I have no questions, your Honor.

(Testimony of Mrs. Lani Booth.)

The Court: Any other attorneys desire to ask any?

Cross-Examination

By Mr. Cass:

Q. Mrs. Booth, is Mrs. Hustace competent to handle her affairs?

A. Right now, on account of her blindness, she isn't able to do that. [154]

Q. You and Mrs. Hustace, Kulamanu, Miss Kathleen Ward and Miss Lucy Ward are the directors of the Victoria Ward, Ltd., are you not?

A. That is rather difficult to answer right now, Mr. Cass. I was a director, but since Mr. Hapai and Lucy have taken over, they have not notified us of any directors' meetings, but have held meetings.

Q. How long since you attended a directors' meeting of the corporation?

A. Since March of this year.

Q. March of last year? A. Yes, last year.

Q. 1948? A. Yes.

Q. And how long since Mrs. Hustace has attended?

A. She was there at the same meeting.

Q. At the same time? A. Yes.

Q. You say that you don't handle your own property. Who handles it for you?

A. I don't handle it?

Q. I understood you to say,—

A. I do handle my own property, but I have to seek legal advice at times. I do handle my own affairs.

(Testimony of Mrs. Lani Booth.)

Q. You do handle your own affairs?

A. Yes.

Q. Does the Hawaiian Trust have any interest in the property that you handle?

A. No, none whatsoever. [155]

Q. Does the Hawaiian Trust have any interest in the property of Mrs. Hustace?

A. Not that I know of.

Q. Do you ask advice from the Hawaiian Trust Company concerning your affairs?

A. Not so far.

Q. Not so much? A. Not so far.

Q. Not so far. Now, Miss Kulamanu, you say, never has handled her own affairs?

A. Not to my knowledge, she has never handled any business affairs.

Q. And that goes back to when she was a girl?

A. Well, she didn't really have anything of her own at that time, in girlhood.

Q. When did she first have property that required management?

A. After the death of my two aunts.

Q. How long ago was that?

A. I am not sure of the death of Mrs. Allen or Mrs. Foster, but it was quite awhile before my mother died.

Q. Your mother died in 1935? A. 1935.

Q. Who handled her affairs from the time she began to have property to manage?

A. I think at the start it was Mr. Ernest Wodehouse, and then Lucy came later.

(Testimony of Mrs. Lani Booth.)

Q. And was it done under power of attorney or how? A. No. [156]

Q. Did she set up a trust, or did she give these powers of attorney?

A. Lucy had the power of attorney.

Q. And Miss Lucy has that power of attorney now? A. So far as I know.

Q. Now, in your petition you said that there is a conflict of interest between Miss Lucy and the interest of Miss Kulamanu. What is that conflict?

A. Right now it would be the the ranch on Molokai.

Q. What is the conflict? What is the difficulty between the two?

A. I understood from Lucy that she had invested some of my sister Kulamanu's money in the ranch. It wasn't a paying ranch at the time. It wouldn't be right. I wouldn't think so, anyway.

Q. In other words, Miss Lucy, you say, has invested Miss Kulamanu's money in a non-paying ranch? A. Yes.

Q. Did Miss Lucy invest her own money in that?

A. Yes.

Q. As much as Kulamanu's?

A. That I couldn't say. I wouldn't know.

Q. You doubt the wisdom of that purchase?

A. I do.

Q. Is that the cause of this particular action?

A. No, not exactly.

Q. Why do you think that a change in the situation of having Miss Kulamanu's attorney-in-fact

(Testimony of Mrs. Lani Booth.)

handle her affairs in favor of a guardian appointed by the Court would be of benefit to her? [157]

Mr. Anthony: I object to the question. Either the alleged incompetent has the capacity or doesn't have the capacity. I don't think the question of whether or not it is wise to have the incompetent handling her own affairs through an attorney-in-fact is a proper question.

Mr. Cass: If the Court please, this is one of the petitioners. I seek to draw from her the reasons for her petition, if she has any other than the direct welfare of her sister.

The Court: The question of the wisdom or non-wisdom of the choice of manager is not a question which this Court passes upon. It is a question of whether or not the Court's jurisdiction has been established by showing incompetency to handle one's own affairs.

Mr. Cass: I seek to draw from this witness the motive back of her petition, if she has a motive other than the welfare of her sister. I think that it is material to this issue that the petitioning party should be under examination to determine whether or not there are any motives other than those that appear on the face of the petition, and that is why I asked her what is her objection to the manner in which Miss Lucy handled her affairs.

The Court: The Court would have to sustain the objection that the motive of the petitioner is not a thing that would disturb the Court or encourage the Court. It is a question of whether or not there is a

(Testimony of Mrs. Lani Booth.)

prima facie proof and ultimately a sufficient proof to indicate the state of incompetency, Mr. Cass.

Mr. Cass: That is true, but she is also a witness as to the competency of her sister, and the motives of the [158] witness in testifying are always material.

The Court: The objection is sustained on the form of the question, as to the particular question you just put. If you want to find out whether this witness is exceeding or exaggerating the truth over the competency, you are at liberty to go into that phase of it, of course.

Q. (By Mr. Cass): Mrs. Booth, when did you first notice that your sister, Kulamanu, was not competent?

A. To handle her affairs or was being forgetful?

Q. Yes.

A. It was during Mother's illness.

Q. That was in 1935 or before that?

A. Before then.

Q. And since that time you don't believe she has been competent to handle her affairs?

A. Definitely not.

Q. Did you ever protest the selection of Miss Kulamanu as a director of your corporation?

A. Yes, I said that she was not capable of understanding some of the things that we had to pass upon, but I was overruled.

Q. What was the nature of some of the things that you referred to?

A. In decisions of the business.

(Testimony of Mrs. Lani Booth.)

Q. That is within the last year or so?

A. And before that, there were other decisions that came up. I can't mention what they were, but Kulamanu couldn't remember long enough. We had to keep prompting her and telling her what it was all about.

Q. When she understood what it was all about, did she [159] decide rationally what was to be done?

A. She would decide what the rest of us would decide upon.

Q. So that from sometime prior to 1935 up to a year or so ago you accepted her as an officer of your corporation and allowed her to vote on the affairs of the corporation?

A. It was Mother's wish, and we all held her there.

Q. The affairs of this corporation, are they very extensive?

A. They are getting almost out of bounds. Yes, they are extensive.

Q. And you believe she is incompetent because she is unable to understand some of the affairs of this corporation?

A. Yes, she is.

Q. How is she on ordinary affairs of knowing what to do with her own affairs?

A. Personal?

Q. Yes. She always has trusted Lucy to do those for her, is that it?

A. In just what way?

Q. Property affairs, her own personal property affairs.

(Testimony of Mrs. Lani Booth.)

A. No, that has always been taken care of by Lucy.

Q. Has Miss Kulamanu got sufficient intelligence to know what Miss Lucy is doing for her?

A. She seemed to have confidence in her and let her go ahead and do what she wanted. In fact, there were times when Lucy didn't even consult her. Things came up hurriedly and she would have to decide quickly.

Q. When Miss Kulamanu first executed her power of attorney to Miss Lucy, did you object?

A. I don't remember when that was done. In fact, I don't think I was here, nor was I told of it until quite awhile later. [160]

Q. Was her condition any different then than it is now?

A. I don't even know when it was done, Mr. Cass.

Q. Well, you said that you noticed her condition began to change during your mother's illness.

A. Yes.

Q. Has there been any decided change since 1935 in Miss Kulamanu's state other than her advanced age?

A. Well, she has become more forgetful.

Q. Isn't it true that Miss Kulamanu is just a nice old lady of approximately 80 years old, maybe a year or so less, with about the same aging qualities of other people of that age?

A. Possibly, but she is not like the way mother used to be.

(Testimony of Mrs. Lani Booth.)

Q. Your mother was an unusual woman.

A. She was an exceptional woman.

Q. By ordinary women of about 80, how would you judge Miss Kulamanu? She is about the same as the rest of the 80-year-old women who have never had business experience themselves, is she not?

A. I wouldn't know how to answer that, because I haven't come in contact with others of that age.

Q. Well, you know Mrs. Hustace.

A. There is no comparison between the two. Mrs. Hustace knows what she is doing, and Miss Kulamanu does not.

Mr. Cass: That's all.

Mr. Anthony: No further questions.

(The witness was excused.)

Mr. Anthony: Your Honor, I think that it might be advisable, at this time, if we would have the report of the [161] guardian ad litem. I have other witnesses in the courtroom. I understand Mr. Carlsmith's position is not to resist the petition. I don't know whether Mr. Cass's position is the same.

The Court: The Court might have a report from the guardian ad litem what, if anything, has been done in the investigation.

Mr. Collins: If your Honor please, as the guardian ad litem in this matter, after conferring with the alleged incompetent and conferring with the physician of the alleged incompetent, it was deemed advisable to have a complete and thorough psy-

chiatric examination made. Now, with this in mind, Dr. Kepner, who is a well-qualified psychiatrist and alienist, with his staff made a thorough investigation over a period of two weeks, as a result of which he has submitted a report to me, which I would like to submit to your Honor, on her mental condition. I offer this in evidence.

The Court: Let the record show that the report has been submitted to the Court. Give me a minute or two to look it over. I would like to ask other counsel if there is any point in putting the doctor on to substantiate the report, or whether this is acceptable to you with the idea that if the doctor appeared and were examined at length, his report would be as indicated here. As I understand it you gentlemen have had opportunity and access to this report?

Mr. Carlsmith: Yes, your Honor.

Mr. Anthony: Yes, your Honor.

Mr. Cass: I believe if he were to appear here and examined, he would testify in accordance with the report [162] submitted. I see no point in having him here.

The Court: All that seems necessary of this report to make a part of this record is that "In summary, it is my opinion that this patient is suffering from organic mental deterioration—on a senile and arteriosclerotic basis—to a very marked degree, with defects in orientation, memory, and judgment which would render her incompetent and unable to properly manage business affairs." The

original report is returned to the custody of the guardian ad litem.

Mr. Anthony: If your Honor please, in the absence of any statement from other counsel as to their position, does the Court desire me to proceed with further proof of like witnesses?

The Court: The Court up to date feels there is sufficient prima facie showing, unless counsel desires a more complete showing.

Mr. Carlsmith: We do not.

Mr. Cass: We do not as to the mental state.

The Court: The Court, therefore, on the presentment as presented, indicates that there is sufficient prima facie proof to show a mental incompetency to handle business affairs.

EDWARD HUSTACE

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please?

A. Edward Hustace.

Q. Do you know Hattie Kulamanu Ward? [163]

A. I do.

Q. Do you know whether or not she has any property within the jurisdiction of this Court?

A. She does.

Q. Can you briefly state what that consists of?

A. She has considerable stocks and bonds, I would say in the neighborhood of \$300,000, and in

(Testimony of Edward Hustace.)

excess, probably. She has a half interest in the large Puuohoku Ranch on Molokai, which is probably valued at around \$200,000, her interest. She has considerable property jointly with Kathleen Ward and Lucy Ward, which is hard to judge the value of the property. It is probably in excess, her interest, in excess of \$250,000.

Q. Could you give us any approximation, a very rough idea of the value of her estate situated within the jurisdiction? A. The value of her estate?

Q. Yes.

A. Probably, just a guess, in the neighborhood of \$1,000,000.

Mr. Anthony: No further questions.

Mr. Collins: No questions.

Cross-Examination

By Mr. Cass:

Q. Mr. Hustace, who has had the business affairs of Miss Kulamanu Ward in his control?

A. Miss Lucy Ward has been handling her affairs.

Q. How about Mr. Hapai?

A. He has been doing the bookkeeping work. The decisions have been made by Lucy Ward.

Q. Was there ever any occasion for Miss Kulamanu Ward to conduct her own business affairs?

A. She was incompetent to do so. I have known her for many years. She is incapable. She can't remember, can't [164] add, can't multiply, couldn't tell the difference between a stock or a bond, prob-

(Testimony of Edward Hustace.)

ably. She has never done any banking as far as I can remember.

Q. That is, for how long can you remember back?

A. I have been associated here in town since June, 1946, and I will base it from June, 1946, to the present date.

Q. How long have you known Miss Kulamanu Ward? A. I have known her all my life.

Q. How long have you known that she couldn't do arithmetic problems, etc.?

A. Well, I would say since June 1, 1946, when I have had a good deal of contact with all three sisters.

Q. Now, do you know whether or not that inability to do arithmetic arises from any deterioration of mind or simply that she is in the position of a number of people who never have done business?

A. From deterioration of mind. She is very forgetful, and is at such an advanced state of mind that she couldn't do it. Probably she did know, and I am not saying that she isn't intelligent, or was intelligent. She probably was an intelligent woman in her day. But today, because of her advanced state of incompetency she couldn't do things like that.

Q. You were employed by the Victoria Ward, Ltd., at one time? A. I was employed, yes.

Q. When did you terminate your employment?

A. November 30, 1948.

Q. What was the occasion of your termination? [165] A. I was fired.

(Testimony of Edward Hustace.)

Q. Now, Mr. Hustace, the managing officers of Victoria Ward, Ltd., are Miss Lucy and Miss Kathleen Ward, aside from the directors, are they?

A. If you call them managing officers. They have the title of such.

Q. What are their offices in the corporation?

A. Miss Kathleen is president, the last time that I can remember, and Lucy is treasurer. Now, what has happened since I left the company, I don't know.

Q. Now, in 1946, when you became associated with the company, was anybody else managing the affairs of the company other than Miss Lucy and Miss Kathleen? A. No.

Q. And they have managed it right straight along ever since?

A. I managed it and they were supposed to take a back seat and let me do the work.

Q. And it was your idea that you were managing the company that caused you to get fired, wasn't it? A. That's right.

Q. And if Miss Kulamanu's stock in the Victoria Ward Company is placed in the hands of a friendly guardian, that is friendly to your interests or your family interests, you propose to upset the Victoria Ward Corporation and put it in your own offices, isn't that right?

A. I don't have to answer that.

Mr. Anthony: I object to that as incompetent. It has nothing to do with this case.

The Court: Has he any personal interest? To

(Testimony of Edward Hustace.)

that [166] extent the Court will permit the question.

A. I have not.

Q. Have you consulted any guardian concerning the operation of Victoria Ward, Ltd.?

A. Have I consulted any?

Q. Yes.

A. I have not done anything with this whole matter.

Q. Did you not present to Miss Kathleen Ward a statement of reorganization of the company just before you were fired, or shortly afterwards?

A. We have made statements. I believe the corporation has tried to do its best for the last 15 years to get reorganized. Mrs. Booth will testify to that. When I was hired that was one of the prime purposes, to try and reorganize the company. It has not been done.

Q. Isn't it true that you have sunk about \$100,000 of money in this market down on the waterfront contrary to orders?

A. Not contrary to orders. We operated without written instructions. We had verbal approval time and time again. That is the way the company operated.

Q. Who suggested the Hawaiian Trust Company to be trustee in this matter?

A. I think it was just a joint meeting of the people who entered the petition that thought some competent trust company should handle the affairs of Miss Kulamane Ward.

(Testimony of Edward Hustace.)

Q. Have you any particular reason for wanting Hawaiian Trust Company? A. No.

Q. Would you agree to another trust company? [167]

Mr. Anthony: I object to that. He is not even a petitioner. This is a witness. He doesn't have anything to say about this matter.

The Court: I think that is correct, Mr. Cass. He is not one of the petitioners here. It doesn't make any difference what he wants or what he doesn't want. It is a question of the competency of the person named.

Mr. Anthony: That goes for anyone's petition in this matter. It is up to the Court, eventually, to determine a trustee.

Mr. Cass: If there is no urgent reason for the nomination of Hawaiian Trust in this matter, however, we would consent to the appointment of any other trust company than the Hawaiian Trust to manage the affairs of Miss Kulamanu.

The Court: On what basis would you have any standing to make any objections? Do you want to prove the Hawaiian Trust is a conniver in this case?

Mr. Cass: I don't want to have to prove it. I am acting under instructions of my clients who are the sisters and greatly concerned with both Miss Kulamanu Ward and the Victoria Ward, Limited. Victoria Ward, Limited, is controlled by six different interests, equal interests, five of whom are active in the management of the corporation, as I understand it. Miss Lucy and Miss Kathleen represent

(Testimony of Edward Hustace.)

the active management of the corporation. The two petitioners here were directors of the board of the corporation and have become dissatisfied with the operation of the corporation. Now, if the guardian of Miss Kulamanu's [168] estate is for the present operators of the company, then there would be the continuing control of this corporation with them. If the guardian is a person who owes any obligation to the petitioners in this case, the control of the corporation goes to the petitioners.

The Court: What has that to do with this witness's examination?

Mr. Cass: It has to do this, if the Court please, that the examination of this witness is for the purpose of determining whether or not he and his mother have an outside interest which will be served by the appointment of a specific guardian for Miss Kulamanu, if Miss Kulamanu must have a guardian; and I wished the Court to be fully informed in connection with that, and the only way that I can inform the Court is by the questions asked, or or by permission of the Court, or addressing the Court as I am now.

The Court: Objection sustained.

Mr. Cass: Nothing further.

Mr. Anthony: No further questions.

(The witness was excused.)

Mr. Anthony: Your Honor, I have no further evidence unless the Court desires further proof, and I understand it has been indicated from the

bench and from counsel that a prima facie case warranting the appointment of a guardian of the property of the incompetent has been made out. As to who should be guardian, your Honor, I might state this to the Court: At the suggestion of the petitioners I approached an officer of the Hawaiian Trust [169] Company and ascertained that they had no interest whatsoever in connection with any of the parties in this case. They held no stock either as trustee or otherwise in this corporation, Victoria Ward, Ltd., which has been referred to in the testimony. Acting upon that I drafted the petition and ascertained from the Hawaiian Trust Company that they would accept the appointment if the Court found grounds for the entry of an order appointing a guardian and if the Court would approve. That is the status of that. There is nothing in Mr. Cass's statement in regard to any bias or prejudice or any reason, whatsoever, that has come to my attention, or I wouldn't state what I have just stated to the Court.

The Court: Has the guardian ad litem gone into this matter?

Mr. Collins: If your Honor please, that matter has been gone into by the guardian ad litem and an investigation was made of the various trust companies that might act in this capacity, and because of disqualifications or for other reasons it was the opinion of the guardian ad litem after investigation that the Hawaiian Trust Company would be a suitable guardian.

The Court: Did you ascertain as to whether or

not there were any conflicting interests in the Hawaiian Trust Company?

Mr. Collins: I did, your Honor, and the result of my investigation was that conflicting interests would arise principally because of the fact that the property owned by the corporation would be property that might be leased to interests which the Hawaiian Trust Company might [170] otherwise represent. But, as far as I can ascertain, that is the sole conflicting reason that appears. That factor was balanced against the other factors on other trust companies, and it was felt that even with that element present that they would be a satisfactory trustee. It would be more satisfactory than other trustees that would be qualified.

The Court: Anything further to go in in that matter that counsel wants to present?

Mr. Cass: If the Court please, the question of whether there is the necessity of a personal guardian in this case.

The Court: You mean as to the person?

Mr. Cass: As to her person, yes.

The Court: That isn't raised in the petition here. The petition simply asks for the guardianship of the property, Mr. Cass.

Mr. Cass: The question always arises when a person is adjudged incompetent.

The Court: Not necessarily so. The personal side may be satisfactorily being taken care of by the fact that the person is under the association of competent persons. I don't understand that anyone has raised the question as to Miss Lucy Ward's

competency, and the testimony here is that the incompetent is living with Miss Lucy Ward, and there is no indication that that condition would be altered in any respect.

Mr. Cass: I ask the Court's permission to file with the Court a petition for the appointment of Miss Lucy [171] Ward as guardian of her sister.

The Court: I really don't see any necessity of the Court going into the question of the appointment of a guardian of the person, Mr. Cass, at this time in connection with this proceeding. That would be something entirely different in character.

Mr. Cass: I ask the Court then to permit me to file a petition for the appointment of Miss Lucy Ward as guardian of the person and estate of Miss Kulamanu, and if the Court shall rule that her interest is conflicting, then for the appointment of Miss Kathleen Ward.

The Court: The Court would not listen to a petition by any of the sisters to be the property guardians because of the fact that they, being sisters with individual interests in the consideration of property, their interest would naturally be conflicting. It would need no proof.

Mr. Anthony: As far as the petitioners are concerned, my clients advise me that the personal situation is under control and insofar as they have been able to ascertain there is no need for the appointment of a guardian of the person at this time.

Mr. Carlsmith: May I state that my investigation indicates that there is no need for the appointment of a guardian of the person of Miss Kulamanu at this time.

The Court: I don't understand from the proof that has been before the Court that there has been any incapacity to the extent of being a personal charge upon the community that requires a personal guardian in view of the family taking care of that situation out of their own motives, that [172] the only question is the question of conservation of property for a person who is mentally incompetent, and here is a porperty in which all the sisters have an individual interest which could at any moment raise adverse problems. So the Court is prepared at this time to rule that the evidence is sufficient to show the necessity of a guardian of the property on the evidence adduced, and the investigation of the guardian ad litem of the situation, and the status of the trust company in the community, unless there be some showing of an adverse interest of such a character as to warrant a real conflict of interests in the handling of the matters by the Hawaiian Trust Company, it is a satisfactory appointee from the Court's viewpoint.

Mr. Anthony: There is the matter of the bond, your Honor, which the Court should pass upon, I believe.

The Court: Well, in the first instance, the Court has a knowledge of the over-all estimate of principal, but I haven't any information on the character of what the annual income is approximately.

Mr. Carlsmith: No bond, as far as we are concerned.

Mr. Anthony: I am informed that the income is approximately \$30,000 per annum.

The Court: Inasmuch as the sale of the property by the guardian would have to be by order of the Court, in that connection, the matter of \$30,000, if the Hawaiian Trust Company isn't able to stand for that, they better go out of business, and unless some further request is made upon a showing, an inventory or otherwise of further necessity, the Court will at the present time issue the order without bond.

(Hearing concluded.) [173]

I Hereby Certify That the foregoing is a full, true and correct transcript of proceedings on January 13, 1949, in the above-entitled matter.

/s/ L. T. CHAFFEE,

Official Court Reporter. [174]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

No. 15,530

TRANSCRIPT OF PROCEEDINGS OF HEARING
ON A MOTION TO SET ASIDE
APPOINTMENT OF GUARDIAN

Before: The Honorable Willson C. Moore,
Judge of the Fourth Division.

Saturday, March 12, 1949

HARRIET BOUSLOG,

Of the Firm of Symonds & Bouslog,

Appearing as Attorney for Miss Lucy K.
Ward.

Whereupon the following proceedings were had:
The Court:

This is in the Matter of the Guardianship of Harriet Kulamanu Ward, an incompetent person, and there is now pending before the Court a motion by Lucy K. Ward for an order appointing next of friend to represent the incompetent in a motion to set aside the appointment of the Hawaiian Trust Company, Ltd., as guardian of the Estate of Harriet Kulamanu Ward.

(Discussion between Court and counsel and the Clerk from Judge Cristy's court as to setting a date for a hearing by Judge Cristy.)

The Court: This motion for appointing next of friend—of Lucy K. Ward, as next of friend; for the purpose of hearing this motion for the removal of the Hawaiian Trust [175] Company or to vacate the order appointing Hawaiian Trust Company as guardian of the Estate of Kulamanu Ward, will be granted—and for that purpose only, the temporary order to show cause why this motion for removal—or motion to vacate the order appointing Hawaiian Trust Company as guardian of Harriet Kulamanu Ward will be set down for Wednesday, March the 16th, at 9 o'clock, and the Hawaiian Trust Company, as guardian, will be restrained from voting the stock in Victoria Ward, Limited, until after the hearing and decision on the merits of the motion—or before this Court can determine on the merits of the right of the movant to the relief prayed.

This Victoria Ward, Limited, what sort of business is that?

Mrs. Bouslog: Real estate business; land and stocks and bonds. In other words——

The Court: This does not tie up a business, or anything like that?

Mrs. Bouslog: No, it just continues it in status quo, your Honor.

The Court: Now, two days prior——

Mrs. Bouslog: I am planning to serve it at once, your Honor.

The Court: This is the 12th.

Mrs. Bouslog: Robertson, Castle & Anthony is attorney for all parties on whom the order to show cause is to be served.

I would like the record to show that the firm of Carlsmith & Carlsmith had entered their appearance for Lucy K. Ward, but she did not appear in that proceeding as the [176] next friend of Harriet Kulamanu Ward. I think it would be well for her to state under oath, though, what the situation in relation to the attorneys is.

The Court: All right. Stand up, Miss Ward, and be sworn.

MISS LUCY K. WARD

was duly sworn, and testified as follows:

Examination

By Mrs. Bouslog:

Q. Will you please state your name?

A. Lucy K. Ward.

(Testimony of Lucy K. Ward.)

Q. Does the firm of Carlsmith & Carlsmith, or Mr. Carlsmith, represent you at this time?

A. No.

Q. Have you notified that firm?

A. I have, by 'phone and also by letter.

Q. And do you recall the date of the letter of notification?

A. (Witness produces letter.)

Q. What is the date at the top of the page?

A. March 5. I think I telephoned on the 1st.

Q. And do you wish the name of Bouslog & Symonds to be substituted as your attorneys?

A. I do.

(Witness excused.)

The Court: The firm of Bouslog & Symonds will be substituted as attorneys of record for Lucy K. Ward——

Mrs. Bouslog: As next friend.

The Court: In this particular proceeding.

(Adjourned.)

I Hereby Certify the above and foregoing, consisting of three pages, to be a full, true and correct transcript of my shorthand notes taken in the within-entitled matter on March 12, 1949, at the place therein set forth.

Honolulu, T. H., April 22, 1949.

/s/ R. N. LINN,

Official Reporter. [177]

March 16, 1949

The Honorable Albert M. Cristy,
Second Judge Presiding.

Appearances:

J. GARNER ANTHONY, ESQ.,
Of Robertson, Castle & Anthony,
For Hawaiian Trust Co., Ltd.; Mellie
E. Hustace and Lani W. Booth.

HARRIET BOUSLOG,
Of Bouslog & Symonds,
For Lucy K. Ward. [178]

Upon the Clerk calling the case, the following proceedings were had:

Mr. Anthony: If the Court please, I appear for Hawaiian Trust Company, Ltd., guardian. I also appear for the petitioners who petitioned for the appointment of the guardian, Mellie Hustace and Lani Booth. They join in the return of the Hawaiian Trust Company.

The Court: I haven't seen the return.

Mr. Anthony: It must be in the file, your Honor.

The Court: It hasn't come in here.

Mr. Anthony: If your Honor will excuse me a moment, I will get that. It was filed yesterday.

(Mr. Anthony procures document and the proceedings continue.)

Mrs. Bouslog: I take it from the return to the

motion and the order to show cause that the Hawaiian Trust Company and, as Mr. Anthony now says, the petitioners Mellie Hustace and Lani Booth deny the allegations of the petition. There is also another question raised by the return and that is the question of there having been a full and complete hearing, as the Hawaiian Trust Company alleges. They apparently feel no need for a further hearing. However, I call the Court's attention to the fact that this is not only a motion to vacate, but a motion to remove, and that this Court under provision 12529 has at all times and retains the right to hear a petition for the removal of a trustee. For that reason the movant in this case would like to proceed with the [179] proof of the allegations of their petition.

Mr. Anthony: If the Court please, this is not a petition for removal. This is a motion to vacate, in the first place. I don't think that there is any necessity for the taking of any evidence. There is a transcript available of the proceeding. Both Miss Lucy Ward and Miss Kathleen Ward appeared in this very court. They were represented by counsel. They acquiesced in the fact of the incompetency. There was evidence produced before the Court. Judge Moore was meticulous in appointing a member of the bar of this Court as guardian ad litem of the alleged incompetent, and the petition was filed, I believe, in November of last year. The guardian ad litem asked for time, which was given him, to study the matter. He employed a competent member of the medical profession, a psychiatrist,

and he examined the alleged incompetent and made a report, which report was offered in evidence and received by this Court. In addition to that there was the testimony of lay witnesses as to the fact of incompetency. Therefore, there is nothing before the Court, as I see it, in this motion. This motion goes on ad nauseum in a series of rather slanderous, scandalous remarks, all of which are irrelevant to any issue in this case. They talk about the alleged misrepresentations, which of course do not exist, and there is no facts alleged as to any misrepresentations to this Court. I serve notice on counsel now that we hold counsel accountable for that kind of remarks in a pleading, even though she may be protected by the laws of libel and slander. [180] As I see it, there is nothing on which to take evidence. There is no allegations in the motion other than bald conclusions of law and these charges of misrepresentations supported by no facts.

These movants here, the movant and her sister, had a full and complete hearing. They had ample notice. They appeared in this Court by counsel, and if they were dissatisfied, then was the time for them to make known their dissatisfaction. Not having done so, I say that it is highly irregular and improper to proceed in this manner to take evidence to re-examine the order and findings of this Court.

The Court: I have difficulty, Mrs. Bouslog, in understanding the character of your proceeding. The record in this Court, as counsel has indicated, and which the Court has refreshed its recollection by a reading of the transcript of what occurred, the

Court had a full, open Court hearing in which your present client was represented by adequate counsel and was given an opportunity by interrogation by the Court as to whether the evidence before the Court at that time was such that he desired to contest the major issue in that hearing as to whether the alleged incompetent was incompetent; and counsel with that opportunity indicated affirmatively to the Court that he did not desire to examine witnesses further that were produced, and more than that, that the psychiatrist whose report was offered to the Court was accessible to him in lieu of examination of the individual as a witness in open court, that the conclusions of [181] incompetency were acceptable and accepted. So that the issue at that proceeding of the incompetence of the person Hattie Kulamanu Ward was before the Court on prima facie evidence conceded by the counsel for your client as being sufficient, and not desiring any further evidence on it, the finding then stood, which by inference indicated that your client over a period of years had acted under a power of attorney, not disclosing the incompetence, which brings the matter in this proceeding a little bit closer home that she is before this Court with unclean hands, assisted by you.

Mrs. Bouslog: I would like to note an exception to the remarks of the Court. The whole basis of this petition is that there was not a full and fair hearing. We will show, if the Court will permit, in the interests of this incompetent, evidence to be adduced before this Court that there were conceal-

ments of the material facts that the Hawaiian Trust Company is not a suitable trustee in this case.

The Court: Now, Mrs. Bouslog, I have got to interrupt here. I am not dealing in generalities. What concealment of what facts are you proceeding to indicate that you are prepared to show?

Mrs. Bouslog: I first want to say to your Honor that this is a motion by Lucy K. Ward, who has been appointed next of friend of Hattie Kulamanu Ward, to bring an action against the appointed guardian. It is more than a motion to vacate the order. There are allegations here which show that there was not—I take it through [182] no fault of this Court, but due to the fact that the parties who understood and knew of the affairs of Hattie Kulamanu Ward were not present in this Court, that their interests were not represented by the counsel who were present in some respects. But this is not an action by Lucy K. Ward on her own behalf, your Honor. This is an action by Lucy K. Ward on behalf and in the interest of her sister's estate.

The Court: What I am asking first, please, the issue as to the incompetency of Hattie Kulamanu Ward has been determined. I am not going back into a reopening of that particular issue, Mrs. Bouslog.

Mrs. Bouslog: We ask the Court to do that.

The Court: That is res judicate in this proceeding.

Mrs. Bouslog: Your Honor, this Court always has inherent powers to reconsider its own actions when facts are brought to its attention which show

that the parties did not have a full, fair and complete hearing, and that they were not apprised——

The Court: That is what I am asking you. What facts as to the competency of Hattie Kulamanu Ward does either your pleadings or anything that you said indicate that the Court was not apprised of or the party Miss Lucy Ward didn't have full opportunity with her counsel to present at the former hearing?

Mrs. Bouslog: We will show that when the guardian ad litem, and we offer to prove by testimony adduced in this Court, that when the guardian ad litem appointed by [183] this Court and the psychiatrists whose reports were received by this Court, that they interviewed in secret this 79-year-old woman, whose sole interests of her estate is the problem before this Court. We are not concerned with of what are the interests of Lucy K. Ward in her own right, but this Court is solely concerned with what must be done to properly protect the property of the ward, of a ward for whom this Court has appointed a guardian.

We will show in the course of this hearing, if the attorney for the petitioners and the Court does not take the position that they do not care to hear any evidence that might be adduced to show that there was not a full and fair and complete hearing.

The Court: You haven't answered my question, please——

Mrs. Bouslog: We have set forth in the petition——

The Court (Continuing): ——as to whether or

not you have any evidence, and will you state *sere-
atum* what it is, that Hattie Kulamanu Ward is
competent?

Mrs. Bouslog: We have evidence, your Honor,
that she has been examined by a competent alienist
other than that alienist whom the guardian ad litem
employed. I have a report from that psychiatrist
which I intend to offer to the Court in respect to
the degree of competency of Hattie Kulamanu
Ward at the proper time in the course of these
proceedings.

The Court: An examination taken when?

Mrs. Bouslog: An examination taken on [184]
March 10, 1949.

The Court: Who is the person that you intend
to offer as such witness?

Mrs. Bouslog: Robert Jacobson, M.D.

The Court: That Hattie Kulamanu Ward is
competent to handle her own affairs?

Mrs. Bouslog: I have a statement by Dr. Jacob-
son——

The Court: I am not interested in a statement.
I am interested in the evidence.

Mrs. Bouslog: To show the degree of competence
of Hattie Kulamanu Ward, in which he reaches the
conclusion that she is competent to determine whom
she wishes to handle and to represent her in her
affairs, although she needs help in the management
of her affairs.

I also want to call the Court's attention to the
fact that this is more than a motion to vacate the
prior proceedings. This is a motion to remove a

trustee, or a motion to remove a guardian. Under the laws of this Territory, Section 12529, this Court not only has jurisdiction, but has the duty to listen to the testimony that can be adduced to show the unfitness or the grounds for removal of a trustee or guardian which has been appointed, and the authority is clear that that question of removal may be brought up by motion in the same proceedings in which the guardian was appointed in the first instance. We have to offer to this Court, and we make an offer to prove at this time, the truth by facts and documentary evidence of all the allegations contained in this motion. This is [185] a verified motion signed by Lucy K. Ward as sister, attorney-in-fact and next of friend of Hattie Kulamanu Ward. We offer to prove all the allegations of this verified petition. We offer to show that there is no conflict of interests between Lucy K. Ward and Hattie Kulamanu Ward; that she has managed her estate for a period of years at the specific request of Hattie Kulamanu Ward; that in the course of that time she has built up the estate of Hattie Kulamanu Ward greater than her own; that she has never speculated or in any way taken any chances with the estate of Hattie Kulamanu Ward; that she has, in the course of that time, never charged one commission or fee for the management of that estate; that she has shown her good faith over the years in the management of the property of her sister by showing that she actually purchased on account of her sister's estate the largest block of shares in Victoria Ward, Limited,

a family corporation which this whole proceeding is a struggle to gain control of.

In other words, we will show that this petition was not brought in the interest of Hattie Kulamanu Ward. It was brought for the purpose of using the stock which she holds in a family corporation as a means of control of the family corporation; that it is not in the interest of Hattie Kulamanu Ward that the Hawaiian Trust Company be appointed and act as such guardian. We will show that Lucy K. Ward, through competent management, through no charge to Hattie Kulamanu Ward, has for years managed her estate and built it up; that the commissions [186] of the Hawaiian Trust Company alone, with the life expectancy of this ward, will exceed the income of the estate for more than one year; will amount, in fact, to somewhere in the neighborhood of \$30,000 for the life expectancy of this particular ward of the Court.

We will show that there is a direct and absolute conflict of interests between the Victoria Ward, Ltd., in which company Hattie Kulamanu Ward has a large block of shares; as a matter of fact, a sufficient block of shares, as alleged in the petition, to swing the control of the company to the Hawaiian Trust Company, whom they represent and their attorneys represent. We will show that by the by-laws of Victoria Ward, Ltd., they are engaged in essentially the same business as the Hawaiian Trust Company, that their very purposes of organization, that they engage in the same kind

of management of real estate that the Hawaiian Trust Company does.

We will show almost section for section that the statutory provisions of the Revised Laws of Hawaii on the powers of trust companies are the same business in which Victoria Ward, Ltd., operates; that a trust company who is managing this estate would have a direct conflict of interests with the Victoria Ward, Ltd., and the shares of stock which Hattie Kulamanu Ward holds, by the very nature of which they could not be a competent and suitable trustee.

We will show that the excessive costs to this ward of this Court is not justified under the facts and circumstances of this case; that there is no [187] necessity for the appointment of a trust company with the statutory commissions and the other allowable expenses which the Court has power under the law of the Territory to allow will eat up the income and principal of this estate unnecessarily, when there are those who for years have looked after, who have cared for, who have given love and affection to Hattie Kulamanu Ward, who have always acted in her interests, who have never taken any risk with her capital, who have built up her estate over a period of time in such a way that no one could doubt their good faith, competence, their suitability and their skill in taking care of the interests of Hattie Kulamanu Ward.

The Court: You are still dodging the question, Mrs. Bouslog, I asked you in the first instance, and I would like it clarified. The proceeding in the Matter of the Guardianship of Hattie Kulamanu

Ward, an incompetent person, is the original proceeding and the proceeding that we are still in. Are you in a position to show this Court that Hattie Kulamanu Ward is competent to manage her own affairs?

Mrs. Bouslog: I am in a position to introduce evidence on which this Court will pass as to the degree of competence of Hattie Kulamanu Ward.

The Court: It is not a question of degree; it is a question of competency or incompetency.

Mrs. Bouslog: I think it is not, your Honor, under the statutes of this Territory. The question is [188] the necessity, the desirability. The interest of Hattie Kulamanu Ward is before this Court and for this Court to protect.

The Court: The first question is, is she competent or incompetent and the Court has had a full hearing upon that point.

Mrs. Bouslog: Your Honor, if what went on before this Court can be called a full hearing then, and the Court does not desire to be apprised of facts of which it was not apprised in the first instance, then of course anything that counsel would say would have no influence upon the Court.

The Court: Well, it is not a question of what the Court wishes, Mrs. Bouslog. It is a question that counsel can't play fast and loose with proceedings in a court of equity through a change of counsel of the parties and rehash something that has been given an opportunity to be heard, and concluded with the conceding and acquiescence of counsel for the same client, and then by change

of counsel start in to reopen and rehash something that was acquiesced in which the parties movant failed to present. It had no excuse as presented in the pleadings as to why that was not presented to the Court in the first instance.

Mrs. Bouslog: In the first place, your Honor, this is a motion not by Lucy K. Ward, but by Lucy K. Ward as next of friend of Hattie Kulamanu Ward. It is not a proceeding in her own personal capacity to protect her own business interests, but it is a suit adverse to the [189] Hawaiian Trust Company, the guardian here, to remove a guardian who is unsuitable. Now, whatever hearings this Court may have held before in respect to the issue of competency, in respect to the matters that were before this Court on the testimony of the petitioners before has no relevancy to the question of the right of this Court given by statute and existing inherent in this Court to at all times consider the suitability of a trustee or guardian appointed by the Court. Perhaps if your Honor would take a look at Section 12529, Revised Laws of Hawaii, by statute it says that this Court has the right and the duty and the jurisdiction to re-examine on the motion of parties whose interests are affected the suitability of a trustee or a guardian who has been appointed by the Court. So even if your Honor says that you do not care to hear, because of prior proceedings herein, any further testimony as to the issue of competency of Hattie Kulamanu Ward, your Honor still has vested by statute the duty on proper application, and the authorities are clear

that a motion in the same proceeding is a proper method to seek the removal of a trustee or a guardian who has been appointed. Your Honor, as a matter of fact, it would be impossible in a collateral proceeding to attack, but the law assumes, and particularly in the field of trustees and guardianship matters, that the Court at all times retains control and is guided and acts in the interests of the person for whom the Court has appointed a guardian.

We will show that the question of the [190] suitability of the Hawaiian Trust Company was not fully heard. We will show acts and conduct of the Hawaiian Trust Company since its appointment which indicate its conflict of interests and its unsuitability to continue as guardian of the Estate of Hattie Kulamanu Ward. We are prepared to prove not only the allegations of our petition which Mr. Anthony is very eager not to have proven in Court, although he easily labels them as unprovable, yet he doesn't seem inclined to permit the Court to pass on the facts which we will present.

I cannot say to your Honor that we will adduce testimony which shows whether or not there was any necessity for the appointment of a guardian. I can say we will offer to this Court testimony of an expert witness who has examined Hattie Kulamanu Ward and who has prepared a report here, who can be brought here in person. It is not for counsel; it is not for Lucy K. Ward to determine the degree of the competency of Hattie Kulamanu Ward. It is for the Court after hearing evidence, to determine——

The Court: The Court will shorten the matter right now. The Court will not go back of the proceeding in which Lucy K. Ward appeared and had full opportunity with counsel present to advise the Court on any matter as to the competency or incompetency and failed to do so. The Court will not go back into the question of the determination of facts that the person Hattie Kulamanu Ward is an incompetent person requiring a guardian to [191] administer the affairs of her estate.

Mrs. Bouslog: Will your Honor permit the movant in this case to show that the instructions given to her attorney were disobeyed in the proceedings which she did not attend?

The Court: I don't think that that is material to the question. It is not a question of whether Lucy K. Ward is at odds with her former counsel for some reason or other. The question is that the matters were before the Court on the question of competency, and all parties had an opportunity there to present to the Court any desires or instructions, and the matter was heard and determined. A second feature of it was, and the record so bears me out, that upon having determined the issue of incompetency upon that hearing, the Court requested the matter of the appointment of a guardian to be gone into, and when the guardian ad litem reported to the Court that he had made full investigation of the various possibilities in the administration of such a sizeable estate and reported that in his judgment the Hawaiian Trust Company was a proper person, the Court then in-

quired of counsel whether there was any objection to the Hawaiian Trust Company and counsel for Lucy Ward even suggested to the Court as far as that side of the picture was concerned they were prepared to waive bond, indicating that if there was any reason why the Hawaiian Trust Company was an incompetent party to be named guardian, it certainly was misrepresented to the Court by Lucy Ward herself through her counsel that Hawaiian Trust Company was competent. [192]

Mrs. Bouslog: I find no such statement in the record, and I call the Court's attention to the fact that the guardian ad litem at the time pointed out a conflict of interests between the Hawaiian Trust Company and the estate.

Mr. Anthony: That is not true, your Honor. I have sat here and I have listened to these repeated misstatements of counsel. There is one thing I would like to call your Honor's attention to, and I think I am entitled to interrupt this dissertation that we are having here. I didn't know until a few minutes ago that there was such a person as a guardian ad litem. I just received, the Clerk just handed me the file. I find in the file an order signed by Judge Moore, papers which were not served on counsel in compliance with the rules of this Court, just exactly as the temporary restraining order. That is the framework that we are operating under. Neither the motion, nor the temporary restraining order, nor the motion for appointment of the guardian ad litem was served, and I tell this Court that I was in consultation with Mrs. Bouslog

Friday and Saturday, the very time she was contemplating and about to file this proceeding, and she didn't have the courtesy to comply with the rules of this Court in the service of these papers.

Mrs. Bouslog: Your Honor, copies were placed in the hands of a serving officer after they were issued Saturday morning. The petition was drawn Friday evening and application was made to the Court Saturday morning and copies were immediately placed in the hands, copies of the motion of Lucy K. Ward, the order to show cause, and [193] temporary restraining order, and according to the records, the report that I have from the sheriff, they were served.

Mr. Anthony: That is not correct. Let's nail these one at a time. The paper that I am talking about is a motion for the appointment of a guardian ad litem. In the ordinary practice in this court it should bear the signature of counsel. It does not, and I have not received it.

Mrs. Bouslog (Producing document): Here is—That is the service.

Mr. Anthony: I am talking about the appointment of a guardian ad litem, Mrs. Bouslog.

Mrs. Bouslog: There is a copy of a motion of Lucy K. Ward, that is an ex parte motion for order appointing next of friend. There is no requirement that notice be served for the appointment of a next of friend.

Mr. Anthony: Now we have it, your Honor. It was done without notice and without service. I assume ultimately I may get a copy.

Mrs. Bouslog: Your Honor, this is a copy of the motion of Lucy K. Ward for certain relief, an order to show cause and a temporary restraining order. It alleges on its face that Lucy K. Ward is the attorney in fact and next of friend of Hattie Kulamanu Ward. On its face it alleges that she has on this day applied to the Court for permission to file this motion as next of friend of Hattie Kulamanu Ward, who is at the present time unable to act in her own behalf.

The Court: Well, Mrs. Bouslog, right [194] there the pleadings indicate something which it seems to me ought to be emphasized in the record we are making, and that is that you, as counsel for Lucy K. Ward, purport to present to Judge Moore who was not a party to the proceedings in the hearings of the incompetency and was acting during my sickness, who knew nothing of what had occurred in that hearing, an allegation that Lucy K. Ward was acting as attorney in fact for a person who had theretofore been found incompetent.

Mrs. Bouslog: No, your Honor, I say for permission to file this motion as next of friend of Hattie Kulamanu Ward, who is at the present time unable to act on her own behalf.

The Court: Please don't dodge the issue that I am indicating to you that you present Lucy K. Ward acting as attorney in fact in part of your allegations.

Mrs. Bouslog: Attorney in fact, next of friend, sister.

The Court: How in heaven's name from any

conceivable legal situation can a party continue to act as an attorney in fact after a guardian has been appointed for an incompetent?

Mrs. Bouslog: That is the reason, your Honor, why we applied to the Court for Lucy K. Ward's appointment as next of friend on the ground that the interests of the appointed guardian were adverse to the interests of the ward of this Court, and therefore someone besides the guardian has to present a motion to remove that guardian. [195]

Mr. Anthony interrupted counsel at the time when I was pointing out that even the guardian ad litem in this proceeding pointed out the conflict of interests between the Hawaiian Trust Company and the estate of Hattie Kulamanu Ward. On page 20 of the transcript—and unless Mr. Anthony in this respect wishes to say that the court reporter did not accurately transcribe, I will read what was said at that time. (Quoting from transcript.)

“The Court: Did you ascertain as to whether or not there were any conflicting interests in the Hawaiian Trust Company?

“Mr. Collins: I did, your Honor, and the result of my investigation was that conflicting interests would arise principally because of the fact that the property owned by the corporation would be property that might be leased to interests which the Hawaiian Trust Company might otherwise represent. But, as far as I can ascertain, that is the sole conflicting interest that appears.”

Well, that is a conflicting interest which appears on the face of the former record. Now we want to show that that is not the only conflicting interest between the Hawaiian Trust Company. We set forth in our verified petition the fact that the Hawaiian Trust Company represents other interests, specifically interests that are adverse not only to Hattie Kulamanu Ward, but are adverse to Victoria Ward, Ltd., in which Hattie Kulamanu Ward holds a large and controlling block of stock.

We offer also to show to this Court that the very purpose of Victoria Ward, Ltd., are adverse and [196] antagonistic to the Hawaiian Trust Company. It appears from the recorded articles of association of Victoria Ward, Ltd., and the powers of a trust company as set forth in the Revised Laws of Hawaii in respect to the nature of business in which a trust company does engage in the Territory.

The Court: Are you purporting to show that the Victoria Ward, Ltd., is a trust company?

Mrs. Bouslog: The Victoria Ward, Ltd., engages, is in competition or engages in the same kind of business which the Hawaiian Trust Company engages in, in respect to the management of real property, the purchase of securities, the representation of others, yes.

The Court: You haven't again answered my question directly, but in your usual manner you have evaded it. Are you purporting to show that the Victoria Ward, Ltd., is a properly constituted trust company under the laws of the Territory of Hawaii?

Mrs. Bouslog: I will show the content of the articles of association of the Victoria Ward, Ltd.

The Court: Can't you answer a direct question, Mrs. Bouslog?

Mrs. Bouslog: Well, I will show your Honor facts which I think show that, but your Honor is the final judge. You decide whether or not there is a conflict of interests. I would like to have you decide it after you see the articles of association of Victoria Ward, Ltd. [197]

The Court: But what I am asking you is whether the Victoria Ward, Ltd., has complied with the laws as a trust company. Has it or hasn't it?

Mrs. Bouslog: It is organized, established, recognized and has never been questioned since its organization in 1930 as Victoria Ward, Ltd., operating and doing the business as set forth in its articles of association.

The Court: I see that I can't get any answer from you, Mrs. Bouslog. Let the record show that counsel refuses to answer questions the Court propounds to it.

Mrs. Bouslog: Let the record show that counsel takes exceptions to that remark. When the Court says to counsel that "Are you purporting to show that Victoria Ward, Ltd., in violation of law operates as a trust company," I think that the Court has asked an improper question of counsel. Counsel, rather than replying to the Court in another manner, chose to offer to the Court the copies of the articles of association. I do not believe that the question of the Court was proper. The question of

the Court indicates a bias and prejudice and an unwillingness to hear the facts and after having heard the facts to rule upon the matters before it.

I will offer the Court at this time photostatic copies from the treasurer's office showing the filing of the articles of association of the Victoria Ward, Ltd., and the Court may, from an examination of those articles of association and from an examination of the statutes of the Territory on the power of trust companies, [198] determine for himself whether he feels there is anything——

The Court: Do I understand, Mrs. Bouslog, that you refuse to put yourself and your client on record as to whether you are purporting to show or offering to show the Court that the Victoria Ward, Ltd., is or is not duly incorporated to act as a trust company within the Territory of Hawaii? I need to know your position, not what the Court's position might be.

Mrs. Bouslog: I want to show that the articles of association of this corporation show that its purposes are as follows: (Quoting from document.)

“(a) To acquire by purchase, lease, hire, gift, devise or bequest, or in any other lawful mode, and to possess, hold, use, enjoy, improve, manage, control, grant, sell, exchange, lease, rent, mortgage, pledge, hypothecate, convey and otherwise dispose of, and generally deal in, real and personal property, corporeal or incorporeal, of every sort, and wheresoever situate, and all rights thereto and interests therein;

“(b) To acquire and take over any of the

property real and personal of any nature which the parties hereto or any of them may convey to this corporation, and to possess, hold, use, enjoy, improve, manage, control, grant, sell, exchange, lease, rent, mortgage, pledge, hypothecate, convey and otherwise dispose of the same;

“(c) To purchase on commission or otherwise, subscribe for, hold, own, sell on commission or otherwise, or otherwise acquire of, dispose of, and generally to deal in, shares, stocks, bonds, notes, debentures, commercial [199] papers, obligations and securities of itself and of other corporations and persons, and also any other securities or evidences of indebtedness whatsoever, or any interests therein, and while owner of the same to exercise all rights, powers and privileges of ownership, including the right to vote;

“(d) To loan money, and negotiate loans, on the security of mortgages, deeds of trust, bonds or otherwise, hypothecation of real and personal property, or without security;

“(e) To borrow money and to pledge, mortgage or hypothecate the whole or any part of its property, real, personal or mixed, to secure the payment thereof; and to issue bonds, debentures, debenture stock, or other obligations either secured by mortgage, trust deed or other appropriate instrument or unsecured, and to create a sinking fund to secure the redemption of any mortgage, hypothecation or pledge made or executed by it, and the payment of all debts,

notes, bonds, debentures, debenture stocks or other evidences of debt made and issued by it;

“(f) To make, draw, accept, endorse and/or execute negotiable instruments;

“(g) To purchase, hold, own and sell shares and property of other corporations, firms or individuals, either absolutely or by way of pledge or mortgage, and to have and exercise all rights and privileges incidental thereto, and to purchase, acquire and deal in stocks, bonds, securities of any government or state, whether foreign or domestic;

“(h) To manage, act as agents, factors or trustees for estates, companies and persons;

“(i) To aid, in any manner, any corporation of which any [200] of the bonds or other securities or evidences of indebtedness or stock are held by this corporation, and to do any acts or things designed to preserve, protect, improve and enhance the value of any such bonds or other securities or evidences of indebtedness or stock;” Etc.

The articles of association go ahead. It is clear that on its face the Victoria Ward, Ltd., the very nature of its business puts its interests in conflict with the Hawaiian Trust Company.

The Court: You still haven't answered my question. All that you have read, as I have been listening carefully, doesn't indicate any power to act as a fiduciary for others as provided in the statute for trust companies. All that you have so far read is

the ordinary pro forma powers of the corporation to engage in business as owners and operators, but to act as fiduciary for others under the trust company act, there is not a word.

Mrs. Bouslog: This corporation engages in the management, the sale, the leasing of real estate. The Hawaiian Trust Company likewise under its powers as a trust company leases, holds and conveys real estate.

The Court: Are you still dodging the question I have asked you as to what your position is, whether the Victoria Ward is incorporated under the trust company statute or not?

Mrs. Bouslog: Victoria Ward, Ltd., is incorporated under the general corporation laws of Hawaii.

The Court: Can't you answer my question?

Mrs. Bouslog: I say it is incorporated under the [201] general corporation laws.

The Court: And not under the trust company statute?

Mrs. Bouslog: It is not incorporated as a trust company.

The Court: Thank you. It has taken a half hour to get that answer from you.

Mrs. Bouslog: It is obvious in the case of the company, your Honor, and I was trying to get your Honor to draw his own conclusion from the purposes stated in the articles of association, the trust companies under the laws of this territory have been given certain powers by statute. The Hawaiian Trust Company engages in exactly the same busi-

ness as the Victoria Ward Company, Ltd., in respect to the management of property. The Victoria Ward Company, Ltd., and Hattie Kulamanu Ward own large tracts of land throughout the Territory. There cannot but be a constant ever present conflict of interests between two companies which are operating in the same kind of business. And not only that, we expect to show to this Court that the Hawaiian Trust Company has already indicated its intention of putting one of its officers as a member of the board of directors of the Victoria Ward Co., Ltd.

The Court: May I stop you right there and ask you what else could it do? Hattie Kulamanu Ward, who is listed as a director in your own pleadings here, has been declared incompetent, and she owns practically a third or fourth of the stock. What else could the guardian do?

Mr. Anthony: This argument is proceeding as though by virtue of this appointment the Hawaiian Trust Company, obtaining the controlling interest in Victoria Ward, Ltd., [202] that——

Mrs. Bouslog: Exactly, that is our contention.

Mr. Anthony: Let me finish, will you please? And that having thus obtained the controlling interest, someday in the future there may arise a conflict between one of the trust estates of Hawaiian Trust Company and the business of Victoria Ward, Ltd. It argues that there are sui juris stockholders beyond the Hawaiian Trust Company as alleged in this very motion. We have only got some 30% interest or less than that in shares of this corporation.

All of this stuff that is alleged in this motion is wholly out of place.

I have not sought to deny in the return *seriatum* the irrelevant falsehoods. I will mention one just to give your Honor an inkling of the liberality with untruth that this movant is indulging in. They make the curious allegation that I am the regularly retained attorney for the Hawaiian Trust Company. It is not denied in the return. Of course everybody in the courtroom knows that is nonsense. It makes the same allegation about Mr. Ernest Cameron. We have not denied the irrelevant allegations in this motion. If we can just fix our minds on what the issue here is, whether or not there is any issue, I think we could get further and dispose of this proceeding. The whole purpose of this is to delay the orderly administration of this guardianship and to permit this attorney in fact who, with full knowledge of the facts of incompetency, for a number of years has held onto the documents and papers and records and assets of the ward's estate, the incompetent's estate, and at this very moment neglects to turn them over to the duly appointed guardian of this [203] estate, to such a degree that we can't even file an income tax return.

Mrs. Bouslog: Your Honor, the petition upon information and belief alleges that Mr. Anthony has been, on behalf of the Hawaiian Trust Company, handling the affairs as they pertain to Victoria Ward Ltd. We intend to prove on what our information and belief is alleged, if the Court and Mr. Anthony will permit us, to introduce proof as to

the basis on which we allege on information and belief. That is the opportunity which we are seeking from this Court. The Court asked what else could the Hawaiian Trust Company do except apply for a director. I have here a number of cases which show that it is improper for a trustee or guardian who has an interest in a conflicting business, or where there might be a conflict, to make himself an officer, a salaried officer or director of a family corporation which represents part of the assets of the estate.

I also call the Court's attention to the fact that there is the question of a violation of the Clayton anti-trust laws in the event this trust company gets involved in the Victoria Ward Ltd.

Mr. Anthony: How about the Wagner Act?

Mrs. Bouslog: I would like to say this to this Court, for I am in a curious position in this particular case in coming and applying, because of an emergency situation, to Judge Moore in the absence of Judge Cristy to whose office I first came for a temporary restraining order to prevent the voting by Hawaiian Trust Company until what I thought was going to be a hearing on the merits of this motion for a [204] temporary restraining order. Now perhaps I have squealed louder in the Territory against ex parte restraining orders than any other person, and Mr. Anthony and other law firms in the Territory have felt that ex parte restraining orders were wonderful, that they should get them within the first few minutes of any labor dispute in the Territory.

The Court: Please, I am not interested in that. Come down to the issues in this case, will you please.

Mrs. Bouslog: I want to say, the Court indicated that I applied to Judge Moore instead when I should have applied to this Court. I want the record to show that I did come to the chambers of this judge and was advised that he was ill, and because the matter for which we needed a restraining order was a meeting of the stockholders at which the Hawaiian Trust Company was to vote the stock of Hattie Kulamanu Ward on Monday, and there wasn't time to wait and prepare and present to this Court prior to the holding of that stockholders meeting, and because of the necessity and urgency we applied on our verified petition to Judge Moore for an order to show cause in the absence of this judge from his chambers. The motion sets forth in full the reasons for the necessity of the issuance of an ex parte order.

The Court: Well, I think it is time to call this proceeding to a brief termination. On the return that has been made to your order to show cause it points out that the Court had, and the Court is aware by the transcript of proceedings which was prepared and which I understand you have a copy of and procured a copy of before you even presented these papers to Judge Moore, that there had been a full hearing [205] in which Miss Lucy Ward, Kathleen Ward and all other Wards were represented by counsel. The question at issue of competency was gone into, and it was determined that the party Hattie Kulamanu Ward was incompetent.

It was consented to by the attorneys representing all the parties before the Court. The issue of the competency of the Hawaiian Trust Company as a proper guardian to be appointed of the property was gone into, and by consent of counsel for Miss Lucy Ward that appointment was made, and even over against the recommendation that the appointment be made without bond, the Court fixed a \$10,000 bond for the guardian so appointed; that upon the very facts that you have indicated it would have made no difference to the Court if the Court had known that small shares of stock were owned by other parties of the Ward family in the Hawaiian Trust Company, as there is nothing indicated in your pleadings or otherwise that there was any conspiracy in which the Hawaiian Trust Company was a party to it to affect adversely any of the interests of the ward; that the issues therefore of competency of the ward and competency of the guardian were gone into, and by the consent of the parties before the Court the appointment was made, and nothing new in your motion indicates that the guardian so appointed has violated any of the confidences and trusts as guardian, but that it is simply proceeding to exercise as it would have a duty to exercise as guardian the rights of a stockholder in Victoria Ward Ltd. and secure the removal of the incompetent of the board of directors in some adequate proceeding, which might be obtained as a proper exercise of that duty of the guardianship. [206]

Now the court of equity is not supervisor of all the corporations in which the Wards have stock.

That is the duty of the guardian to protect those stock interests, not the duty of the Court to sit as a sort of ersatz director of the actions of the guardian, unless upon an accounting, upon a showing that there has been an improper exercise of those obligations, and that on the record made before this Court by your own motion Miss Lucy Ward, who before the original hearing appeared by inference of the evidence adduced, in the consent of her counsel in waiving any objection thereto, has been in the position of concealing from the Court the incompetency of her sister over a period of years.

There is one other factor that is in this record which I want to emphasize and comment upon. There has now been filed an inventory by the guardian showing that in 1947, during the period in which the evidence before this Court at the former hearing, indicated that the sister had been incompetent over a period of years, and Lucy Ward, acting under a power of attorney given years before by such an incompetent person, mortgages large values of stock of her sister to take a joint tenancy in a ranch, a joint tenancy with rights of survivorship, in other words, feathering her own possible bed in case she survives her sister, to get into her hands a property that according to the very note has some \$350,000 or \$400,000 of value, hocked in the ward's property, a thing which the guardian of the property of Hattie Kalumanu Ward will have to go into as to whether such a deal is a proper deal in the protection of the rights of the ward. And that person, your client, now by a change of

counsel purports [207] to start a proceeding as next of friend, and the Court at this time is prepared to vacate that order of appointment of next of friend at this time without any further hearing, but upon the record made in this Court; that the order heretofore entered by Judge Moore in my absence, appointing Lucy Ward as next of friend of Hattie Kulamanu Ward was inadvertently executed by Judge Moore without knowledge of the record here and induced by counsel who should have presented to the Court full knowledge and have had before the Court the counsel that she knew was counsel of record for the guardian so appointed, and her failure to do so indicates a course of conduct of counsel which I will not further comment upon.

Upon the record before this Court I can find nothing which justifies this Court to reopen the question of incompetency, or reopen the question of competency of the guardian appointed.

Mrs. Bouslog: Your Honor, I first want to take exception and to say that I believe that your Honor has manifested against Miss Lucy Ward a bias and a prejudice which shows that your Honor, with the feelings you have, should have disqualified yourself to act. There is not one word in the hearing of the transcript which was made before your Honor, there is not one word here except the slanderous statements which Mr. Anthony may have made about the purpose of this proceeding to indicate that Miss Lucy Ward has done anything except to care properly and fully, free of charge,

not at the commissions the way the Hawaiian Trust Company charges commissions, but for years she has acted in behalf of her sister as a friend, as a sister; she has lived in the same house with her. She has lived in peace [208] and harmony with her. She has built up her estate from a small estate to a large estate, and for this Court to say in the absence of any word in the transcript, any testimony of any kind that Miss Lucy Ward has for years concealed the incompetency of her sister when all your Honor knows about the degree of competency of Kulamanu Ward, or at least all the record shows are three lines from a report of a psychiatrist employed not by those who love and are interested in Hattie Kulamanu Ward, but appointed by an attorney appointed by her who in turn appoints someone and who acts as if the people whom Hattie Kulamanu Ward trusts and loves and lives with are foresworn enemies.

Now, your Honor, I think that your Honor's remarks directed to Miss Lucy K. Ward were highly improper, and that they do indicate such a prejudice that your Honor should permit some other judge to hear the matters raised by this petition. I also want to take exception to the vacation of the order appointing Lucy K. Ward next of friend for Hattie Kulamanu Ward to represent her interests which are adverse to the guardian, and at this time I would like to serve notice that an appeal will be taken from the ruling of this Court, and I would like to state for the record the offer of proof of what we offer to prove to this Court would this

Court and would the attorney for the petitioners be willing to hear the facts. I would like to state for the purposes of the record on appeal what we intend to prove.

The Court: I am listening to your offer of proof, if you want to make it of record.

Mrs. Bouslog: Yes, I do. We offer to prove all the [209] allegations contained in the verified complaint. We offer to prove that there is no conflict of interests between Lucy K. Ward and the interests of Hattie Kulamanu Ward. We offer to show that Lucy K. Ward has managed and properly and prudently managed with great business acumen the estate of Hattie Kulamanu Ward for a period of years; that she has not risked the capital of Hattie Kulamanu Ward, but has invested it in investments which are safe investments; that she has built up in fact Hattie Kulamanu Ward's estate greater than her own; that she has given it more care than she has in the management of her own in respect to risking capital.

That she has, over the period of years when she has assisted her sister in the management of her property, charged no commissions or fees of any kind whatsoever; that she has the confidence and trust of Hattie Kulamanu Ward and has always had that confidence and trust, and that she has acted entirely and in complete good faith in the management of her sister's estate. We would show, for example, that it was Lucy K. Ward who on behalf of her sister bought the largest block of

shares for Hattie Kulamanu Ward in the family corporation, Victoria Ward, Ltd.

We will show in addition to the specific allegations in support of the general allegations contained in the guardianship matter, that there is a direct conflict of interests between the Hawaiian Trust Company and the Victoria Ward, Ltd., by virtue of the nature of the operations in which the Victoria Ward, Ltd., and the Hawaiian Trust Company operate in the particular business in which they engage. We will show [210] that because of this conflict of interests, the Hawaiian Trust Company is not a suitable trustee to manage the estate and property of Hattie Kulamanu Ward, who owns a large block of shares in that corporation.

We will show that it is to the financial detriment and interest of Hattie Kulamanu Ward that the Hawaiian Trust Company be appointed as her guardian of her estate, it now being properly and competently managed, and has always been so managed without cost to her, and the excessive cost of Hawaiian Trust Company to the estate is unwarranted under the facts and circumstances which we would show to this Court.

We would show that the Hawaiian Trust Company has indicated an intention to place itself upon the board of directors of the Victoria Ward, Ltd., that it is not to the interest of Hattie Kulamanu Ward or the Victoria Ward, Ltd., in which she owns a large block of stock, because of the conflicting interest between them.

We will show certain past attempts of the Ha-

waiian Trust Company and the directors of the Hawaiian Trust Company to acquire land belonging to Hattie Kulamanu Ward and the Victoria Ward, Ltd.

We will show through competent medical expert testimony the doubtful necessity of appointing a trustee for the estate of Hattie Kulamanu Ward. We will show that there are certain past acts and conduct of the Hawaiian Trust Company and its officers in respect to other estates in which Hattie Kulamanu Ward has an interest which indicate that it would not be to the interest of Hattie Kulamanu Ward or her estate to have her property managed by the Hawaiian Trust Company or any [211] trust company because of the conflict of interest in the nature of the business.

We will show that the Hawaiian Trust Company has indicated an intention to sell certain of the property of Hattie Kulamanu Ward and that it is not in the interest of Hattie Kulamanu Ward that the property and stock indicated be sold.

We will note an appeal from the ruling of this Court in respect to the motion to vacate and to hold further hearings in respect to the motion to remove the Hawaiian Trust Company as guardian, and we will ask the Court, at this time, pending the appeal to the Supreme Court of the Territory to continue in effect the restraining order prohibiting the Hawaiian Trust Company from voting the stock of Hattie Kulamanu Ward in the Victoria Ward, Ltd., pending the appeal and the determination of the suitability and propriety of Hawaiian

Trust Company as guardian of the estate of Hattie Kulamanu Ward. I assume that from your Honor's previous ruling that you would not continue any restraint pending appeal.

The Court: The Court has indicated that I am vacating the appointment of Lucy Ward as next friend to bring these proceedings, Mrs. Bouslog, on the ground that your client, Lucy K. Ward, is estopped from the very record here from appearing and reopening and rehashing what she consented to and acquiesced in in the action of this Court.

Mrs. Bouslog: As part of our offer of proof I wish to add this: We will show that Lucy K. Ward did not appear in the former proceedings, and we offer to show that her instructions to oppose the appointment of the Hawaiian Trust Company were not respected by the attorney who appeared on her behalf in that proceeding. But this proceeding is not [212] on behalf of Lucy K. Ward; it is on behalf of Hattie Kulamanu Ward as her next friend.

The Court: I will have to interrupt you there that it is obvious on the record that it is tweedledum and tweedle-dee that Lucy K. Ward is appearing because Lucy K. Ward's interests have been jeopardized in the proceedings and not Hattie Kulamanu Ward's. The fact is that by the appointment of the guardian the guardian is simply now in the necessity of being a party to the various family proceedings insofar as its ward's interests are concerned, and the family are in the same position joining with Lucy Ward or joining with the Ha-

Hawaiian Trust Company on matters that are properly protecting of their interests. As to the personal conduct of Lucy Ward to her sister, there is nothing in the record that indicates that it hasn't been anything but exemplary, and that is the reason the Court refused to go into the question of appointing a personal guardian, as the Court was apprised by all the parties that the personal affairs of the ward were being very satisfactorily taken care of; but that the property interests, the very record, itself, shows the carelessness with which you use the truth, Mrs. Bouslog, that Lucy K. Ward's interests as a property owner are directly adverse to her sister's as a property owner. That is in the record.

Mrs. Bouslog: Your statement to the effect is in the record.

The Court: No one with any common sense can take any other conclusion but what the two sisters whose interests are individual would have conflicting interests in the [213] question of the administration of the property where one is incompetent and the other is playing the situation as controller of the incompetent's interests.

Mrs. Bouslog: Your Honor, I want to point out that your Honor found that there was a conflict of interests, or said on the record that there was a conflict of interests between Lucy K. Ward and Kathleen Ward; yet at the same time your Honor by the appointment of the Hawaiian Trust Company as trustee turned the control over to other sisters who must have exactly the same conflicting interests, if there is such a thing.

The Court: I haven't turned the control over to anybody. The question of how they readjust their affairs amongst one another is a matter of future business and justification of their accountings.

Mrs. Bouslog: I have one more point to add to my offer of proof. We will prove that the proceedings for the appointment of a guardian of Hattie Kulamanu Ward were brought not in the interests of Hattie Kulamanu Ward, but for the purpose of using her interests, her stock interests in Victoria Ward, Ltd., as a tool to gain control of the Victoria Ward, Ltd., and that the proceedings had and the hearings held here have not been in the interests of the property and estate of Hattie Kulamanu Ward, but have been motivated and have been prompted and have been done and the conduct taken shows that what will be done unless the Hawaiian Trust Company is removed as guardian will be to the serious detriment of the Estate of Hattie Kulamanu Ward.

The Court: There is one other matter that is pending before the Court, and that is a motion for an order of [214] delivery of records.

Mr. Anthony: Before we leave that, your Honor, I would like to have a ruling of the Court on our prayer in the return that the statute requires the deposit of a bond before the issuance of any restraining order restraining a person in the exercise of his property rights. This restraining order was not only obtained without service on counsel at a time when counsel for the movant was talking to me, but in violation of the statutory provision it

was obtained without the deposit of the requisite bond. It has been held repeatedly by the Supreme Court on vacating a temporary restraining order that the losing party is obliged to pay the cost of the proceeding. There is no reason that I can see why the estate of Hattie Kulamanu Ward should be obliged to pay for my services investigating this matter and preparing these papers which were needlessly prepared. It should be borne by the movant.

The Court: What is the basis on which you are asking for fees, etc.?

Mr. Anthony: Well, the motion was brought in violation——

The Court: Yes, I know, but complete your motion. What is your motion now as to the fixing of fees?

Mr. Anthony: I move that a reasonable attorney's fee be fixed in this case for vacation of the temporary restraining order.

Mrs. Bouslog: Your Honor, I would like to point out to the Court that it has been the practice of the Circuit Courts of the Territory not to require bonds unless actual property is restrained. There is no property that has been [215] restrained here. There is no basis in law or in fact for Mr. Anthony's request. He has improperly stated that a bond was required when the statute does not require it, and as your Honor knows it has been customary to issue ex parte restraining orders, temporary restraining orders in many cases without any bond whatsoever

and without even the allowance of any attorney's fees when the ex parte order was set aside.

The Court: What is counsel's estimate as to reasonable attorney's fees?

Mr. Anthony: I would say \$200, your Honor. I would be content with anything, but whatever it is I would take the Court's order on a reasonable amount. I don't think this ward's estate should be saddled with this kind of proceeding. Whatever the Court fixes is agreeable with me.

The Court: Well, the Court will vacate the restraining order, vacate the entire proceedings of the appointment as I indicated and sign an order to that effect and award counsel fees against the movant in the sum of \$100, and costs of Court.

Mrs. Bouslog: We would note an exception to the Court's ruling and note an appeal.

The Court: Now the question of the motion for delivery of record.

Mr. Bouslog: Your Honor, at this time, this motion was served upon the parties yesterday. At this time we would request the Court that counsel for the Hawaiian Trust Company make more specific its motion since it is impossible to tell from the form of the motion what papers or documents the Hawaiian Trust Company requires. Representatives of the [216] Hawaiian Trust Company have spent many hours in the office of the accountant for the Victoria Ward, Ltd., and they have examined the papers there. Now we would like to have a written specification of the papers which the

guardian wishes. From the form of the motion it is impossible to tell.

The Court: Mrs. Bouslog, the record here is that, and upon your own offer of proof, that Lucy K. Ward has been the acting manager of Hattie Kulamanu Ward's affairs for years. How in the world is the newly appointed guardian to know what papers she has. She is in the position of knowing what belongs to her sister and should have turned it over without an order.

Mrs. Bouslog: She has already turned over all the property to the trust company.

Mr. Anthony: This is a typical dodging. To give your Honor a specific example, the guardian is under a statutory duty to file an income tax return yesterday. He was unable to do so because the check books are in this woman's possession, or somebody has got it, is secreting it from the guardian. Obviously we can't specify what the papers are. I suggest that we examine Miss Lucy Ward on the witness stand. We don't want anything she doesn't have, but whatever she has got we want it, and the only way for us to get it apparently is by an order of this Court. We want the check book. We want the tax returns. We want everything she has got in relation to the incompetent's property. By her own statement and her own pleadings she has been doing this for years, and we don't know what the papers are. More than that, [217] a letter was written enumerating the specific things that were requested, and they didn't comply with it. We have exhausted all reasonable

and peaceful methods, your Honor. The Hawaiian Trust Company, against my advice I might say, I took the position, knowing something about this situation that we had better have a proceeding here in court directing Miss Lucy Ward to turn over the documents. Hawaiian Trust Company said they had never heard of such a thing, that it would come right over automatically, and they proceeded in the normal way. It is true they got certain papers. They had to go to the record office for others. I don't know whether they have the documents, the leases and deeds, but certainly we don't have the check book and these things to make up the tax returns, and we can't get them without an order of this Court.

Mrs. Bouslog: If it is agreeable with counsel for the trust company, I would suggest that the Court set a later time for hearing on this motion, and in the meantime let's let counsel confer to see specifically what it is that is wanted. There has been a letter received from the Hawaiian Trust Company with which Mr. Hapai has tried to furnish all the information, the accountant has tried to furnish all the information. If we could have a conference, I think we can iron this thing out.

Mr. Anthony: A conference will do no earthly good, your Honor, and I think the guardian can only insist that an order be entered directing Lucy Ward to deliver over to it all books, papers and records belonging to this incompetent in her possession or subject to her control. Now whether or [218] not she later complies with that order will

depend on a subsequent proceeding, but I can see myself now conferring with Mrs. Bouslog and Mr. Henry Hapai. I tried to get some of these papers myself, and I have been subjected to the same run around. Nothing short of an order of this Court will suffice, your Honor.

Mrs. Bouslog: Well, your Honor, it is impossible to tell from the motion and from the material that has already been submitted to the Hawaiian Trust Company or records which they have been able to examine just exactly what it is that is wanted. I am not objecting to this Court making an order, but I was merely requesting that counsel confer first, and then if not satisfied, then we have a hearing on the motion. The motion in this form certainly does not apprise Miss Lucy Ward of what it is that the trust company wants. Do they want the papers back to 1870? How do you separate the papers affecting Hattie Kulamanu Ward and the papers affecting the Victoria Ward, Ltd., which are required to be kept in the office of the company. So I have no objection to Mr. Anthony having a hearing on his motion if first we may have a specification so that we may examine a report to the Court what specifically is available and the Court can then make its order.

Mr. Anthony: Will counsel let me examine the letter that Hawaiian Trust Company has addressed to your client? (Mr. Anthony quotes from document.) This is dated February 14th. "Miss Lucy K. Ward. We are pleased to inform you that the inventory of Miss H. Kulamanu Ward's assets has

been completed with the exception of certain land holdings at Halawa, [219] Molokai. The Maui tax assessor has been requested to supply us with this information and upon receipt of same we shall submit to the Court the completed inventory.

“Naturally there are many other extraordinary items of business in connection with your sister’s affairs still to be attended to by us; some in the immediate future and others at some later date. To keep you fully informed of the data which are still to be obtained and of some of the situations which we are obligated under the law to correct for the benefit of the ward we submit for your perusal a short outline of what we have in mind. It is felt that a full understanding on your part of the various problems at hand, most of which are closely linked to your own, will greatly reduce any possible misunderstanding and will assure a prompt and amicable solution.”

Then they discuss the matter of the practical nurse. (Continuing to quote from document):

“The following data for the checking of the last three Federal and Territorial income tax returns, as well as for the preparing of the 1948 returns, are needed and since we have no detailed accounts of her expenditures, we have to obtain this information from you. Since the 1948 returns have to be filed on or before March 15, we would appreciate receiving this information on or before February 25.”

The letter, incidentally, is dated the 14th. Then for 1945, 1946, 1947 and 1948 they list the following items that they have got to have information on: Medical expense, Territorial gross income taxes, tax on mainland dividends, property taxes, interest on bank loan, donations, Federal [220] estimated and final income taxes, other deductible items for three years.

(Continuing to quote from document):

“We may be able to get most of this information from Miss H. Kulamanu Ward’s check books. These should be turned over to us.

“We would also require a statement of operations for the Puuohoku Ranch for 1947 and 1948 in order to claim operating losses on the respective tax returns. We understand that for 1947 the losses of the Ranch amounted to approximately \$18,000.00 and since your sister has contributed one-half of the cash requirements, some \$9,000.00 in losses could be deducted from her tax return for 1947, thereby reducing her tax liability considerably. The same would apply to 1948 and for this reason we have to insist on getting this information.

“For our records we would have to be informed of the disposition of Miss H. Kulamanu Ward’s one-third interest in rentals for 1948 from jointly owned property which according to Mr. Hapai’s statement of December 31, 1948, before closing is listed at \$36,950.00 for rentals and \$6,841.86 for tax refunds. Her

one-third share amounts to \$14,597.29 and we have been unable to find such an item among the deposits to her checking account with the Bank of Hawaii. It is possible that this amount was credited to the ranch account of which we have no record.

“Among the ward’s assets are two concentrations, representing a large percentage thereof and for this reason require closer attention at this time; viz, 1230 shares Victoria Ward, [221] Ltd., and the one-half interest in Puuohoku Ranch.

“To properly protect the 23.653% interest in the Victoria Ward, Ltd., we consider it our duty to have one of our officers placed on the Board of Directors and with this thought in mind we shall request you in due time to call a special stockholders’ meeting.

“The investment in Puuohoku Ranch due to its unprofitable operations during the past year and a half, when economical conditions were very favorable for this type of business, may have to be classified as an undesirable holding for a guardianship account, in which event we would have to dispose of it.

“Without any doubt, there will be other problems arising from time to time and you may rest assured that we will keep you fully advised whenever mutual interests are involved.

“We hope that you fully understand our position as guardian and realize the responsi-

bilities placed upon us in this capacity. Your continued friendly cooperation will be greatly appreciated."

Now, the truth of the matter is this, we don't know what to specify. They have got the papers. All we have to do is to have an order entered substantially in the terms of the motion, and it will be self-operating. If they have in fact turned them over, that is the end of it. If in fact they have not turned them over, and the guardian brings that to the attention of the Court, then a proceeding can be had on that failure to comply. But we certainly must have the order. Otherwise, our hands are tied.

Mrs. Bouslog: I would like to say this, that all of the information specified has been, the tax returns, the Territorial gross income tax paid, the Territorial property, [222] all the tax returns, I believe Mr. Klebahn and an employee spent considerable time checking those returns in the office of the company. There are several errors in the inventory and a misunderstanding as to the Puuhoku Ranch, about the income tax returns, which need to be straightened out, because it is my understanding that Hattie Kulamann Ward's money has not been invested in the ranching operations, that she is the owner of the land, that the business venture is at the risk of her sister's estate, and that her money has not been invested in the ranching operations as such, but she is to share in the profits of the use of the land if and when there are any.

but that her money has not been invested in the ranching operations as such.

Mr. Anthony: Your Honor, I don't accept counsel's statement. I have got an officer of Hawaiian Trust Company here, and I would prefer to put him on the witness stand and have him say what has been delivered and what he needs.

The Court: We will take a five-minute recess.

(Recess.)

A. F. MAHN

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please? A. A. F. Mahn.

Q. You are an officer of Hawaiian Trust Company, Ltd.?

A. I am vice-president and treasurer.

Q. Mr. Mahn, have you made an effort to get certain books, records and papers belonging to the incompetent's estate [223] from Lucy Ward?

A. I personally did not make any effort, but I had certain people sent over to the office for information.

Q. Did you get that information?

A. We got part of the information.

Mrs. Bouslog: Your Honor, this man can't testify as to his own knowledge as to what the people did whom he sent over there. I suggest we have someone who was actually there.

(Testimony of A. F. Mahn.)

The Court: He is competent to testify whether he got any information back.

Mrs. Bouslog: I will ask his testimony as to what conversations were had and what he got be stricken.

Mr. Anthony: I haven't asked him about any conversations.

Mrs. Bouslog: He said he wasn't there. He didn't go. He didn't know what happened. I think it is hearsay what he says.

Q. (By Mr. Anthony): Mr. Mahn, what does the guardian need in order to conduct the affairs of this estate? What information do you need?

A. We should be furnished with all the receipts and disbursements made during the past few years in order to properly check any past tax returns.

Q. You need the check book?

A. We need the check book.

Q. Over a period of years?

A. Over at least four years, at least.

Q. And you have to make up an income tax return?

A. For the income tax return we require an itemized statement [224] of all deductions, especially in regard to medical expenses, nurses' fees, etc., as well as any other donations which may have been made.

Q. You need an itemized account of expenses paid for keeping the records and accounts of the incompetent's estate, do you not? A. We do.

(Testimony of A. F. Mahn.)

Q. Have there been such expenses in the past before the appointment of the guardian?

A. There have been.

Q. And you have to have those figures in order to present a proper deduction?

A. Yes, we should be furnished with all that information.

Q. There are specifically fees of Mr. Hapai for keeping the books and records, is that correct?

A. That is correct.

Q. Does Lucy Ward have an office in this city, do you know, or does she have an office in the office of Victoria Ward, Ltd.?

A. There is an office at King Street. I believe it is Victoria Ward, Ltd.'s, office. And at times she may be found at Mr. Hapai's office.

Q. You heard the letter which I read to the Court from the Hawaiian Trust company dated February 14?

A. Yes.

Q. Has that request been complied with? Was that information delivered over to you?

A. Not the tax information. The tax information has not been furnished us which we specified in the letter. [225]

Q. Well, have any papers been delivered over to you?

A. We did receive deeds to certain properties. I believe we have a complete file of all the existing leases, in connection with the ward's property,

Q. You had to get those things from the record office, did you?

A. Most of it.

(Testimony of A. F. Mahn.)

Q. You couldn't get them from Lucy Ward?

A. No, because they were covering only jointly owned property.

Q. I see. Specifically you need all the papers in the possession of Lucy Ward or anybody who is acting under her control, such as Mr. Hapai, in order to do your job as guardian?

A. Yes.

Mr. Anthony: That's all.

Cross-Examination

By Mrs. Bouslog:

Q. Did you at any time ever confer with Mr. Hapai about the information that you desired to get from him?

A. I had a couple of telephone calls.

Q. With Mr. Hapai? A. With Mr. Hapai.

Q. Whom did you send over to the office of Mr. Hapai for the purpose of examining the tax returns and the other information?

A. One of the members of our income tax department.

Q. Do you remember who it was?

A. Henry Chuck.

Q. Henry Chun? A. Chuck. [226]

Q. Did you yourself participate in any way in the making out of the inventory of the Hattie Kulanu Ward estate?

A. I did.

Q. You were given the information, you were furnished the information about the assets in her estate by Mr. Hapai?

A. No.

Q. Where did you get the information from?

(Testimony of A. F. Mahn.)

A. Two of our officers went over and saw Mr. Hapai and Miss Lucy Ward.

Q. They were furnished that information by Mr. Hapai and by Miss Lucy Ward?

A. Yes, in connection with the inventory.

Q. Yes. And you say the copies of the documents and leases which you got from the recorder's office were joint leases of property belonging to, as joint tenants, to Hattie Kulamanu Ward, Lucy K. Ward and Kathleen Ward?

A. That's right.

Q. Much of the property held by Hattie Kulamanu Ward is jointly owned property, is it not?

A. Yes, real estate, I would say.

Q. And the tax returns were filed for Hattie Kulamanu Ward for the years 1945, 1946 and 1947 and your officers or agents have examined those returns?

A. We did not get any copies, which we requested.

Q. But you have examined the returns in the office of Mr. Hapai? A. That is correct.

Q. You were free to make copies of those and you did in fact make copies?

A. We did. [227]

Mr. Anthony: We object to that. That is utterly immaterial. These papers of the incompetent ought to be delivered over to us. They don't belong to Mr. Hapai or Lucy Ward. They belong to the guardian under the order of this Court. I don't know whether they are accurate or not, the

(Testimony of A. F. Mahn.)

copies made under the circumstances they were made. Whatever papers there are, they should be delivered over to us.

Mrs. Bouslog: Your Honor, the record shows that in this case that there was no appointment of a guardian until January 13, 1949. There is no showing that her property was incompetently or otherwise mishandled prior to that time. The tax returns for 1945, 1946 and 1947 have been made available to the Hawaiian Trust Company.

The Court: Mrs. Bouslog, it seems to the Court the burden is upon your client, not upon the guardian, the burden is upon her to determine and deliver over all information requested, and the burden is upon her that if she conceals things which are rightfully the property of the guardian that the responsibility for such a concealment should be hers and not through lack of knowledge the guardian's, so that the natural order that would have to be granted would be that Miss Lucy Ward and anyone under her control turn over such documents that exclusively reflect the property of the ward and make available information on any other documents on which there is a joint interest, so that the compliance with it would be the responsibility of your clients.

Mrs. Bouslog: Yes, your Honor, what we are objecting to is by the testimony of this witness there has been no evidence of any refusal to permit complete examination of the papers in the office.

(Testimony of A. F. Mahn.)

I have no further questions of [228] this witness, but I would like to call some witnesses.

Redirect Examination

By Mr. Anthony:

Q. You don't have the check book?

A. No.

Q. You need that, you need the check book for past years?

Mrs. Bouslog: Will counsel stop leading the witness?

Mr. Anthony: I will not, not on a question like that, until I am ordered by the Court.

Mrs. Bouslog: I object to the form of the question, your Honor, as leading.

The Court: Objection sustained.

Q. Do you require a check book?

A. We do.

Q. To make a tax return? A. We do.

Q. And that should cover a period of years?

A. At least four years.

Mrs. Bouslog: May Mr. Anthony be sworn so that he can testify?

The Court: Objection overruled.

Mr. Anthony: No further questions.

(The witness was excused.)

HENRY C. HAPAI

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mrs. Bouslog:

Q. State your name, please.

A. Henry C. Hapai.

Q. You are an officer of Victoria Ward, [229] Ltd.?

A. Vice-president.

Q. What services have you performed in respect to the property of Hattie Kulamanu Ward?

A. I was accountant for Hattie Kulamanu Ward.

Q. What, if any, dealings have you had in respect to the estate of Hattie Kulamanu Ward since January 13, 1949, when the guardian was appointed?

A. Nothing.

Q. Have you had occasion to confer with any representatives of the Hawaiian Trust Company who were appointed guardian?

A. Since appointment?

Q. Since the appointment.

A. I have.

Q. With whom have you conferred?

A. Mr. Klebahn and Mr. McLane.

Q. Mr. Anthony read into the record a letter addressed to Miss Lucy K. Ward in which the Hawaiian Trust Company made certain requests for information. This is the specific information which they requested. Let the record show I am handing to Mr. Hapai the letter of the Hawaiian

(Testimony of Henry C. Hapai.)

Trust Company calling for certain itemized information. Will you tell the Court what if any information you were able to give and did give the Hawaiian Trust Company respecting the items listed there?

A. These informations are all in my files and the representative of the Hawaiian Trust Company had the privilege of checking my files. All these informations are in my files. The man that checked my files never asked me questions in regard to these things, just went over my files, and that's all I know about it. And those files are my personal property. [230]

Q. They are your records of what you did?

A. They are my records.

Q. As an accountant?

A. As an accountant.

Q. For Hattie Kulamanu Ward? A. Yes.

Q. And did the officers who came over ask you to remove your records in respect to Hattie Kulamanu Ward? A. No.

Q. Did they ask to make copies of them?

A. No.

Q. Did you permit them to examine them without any hindrance? A. Yes, I did.

Q. Did you attempt to give them every assistance you could in the information which they wanted?

A. They didn't ask me for it. If they did, I would give them the assistance. It was all in the files.

Q. You gave them the files?

(Testimony of Henry C. Hapai.)

A. I turned over the whole files.

Q. You are the one who has kept those records, are you? A. I am.

Q. Did you prepare the tax returns for Hattie Kulamanu Ward for the years 1945, 1946 and 1947? A. Yes, I did.

Q. You made copies of those returns available to them? A. Those copies are in my files.

Q. You note that the Hawaiian Trust Company raises some question in respect to losses on tax returns for 1947 and 1948 in relation to the Puuohoku Ranch. Does Miss Hattie Kulamanu Ward's estate, was it charged any of the losses of [231] the ranching operations? A. No.

Q. Was the money of Hattie Kulamanu Ward invested in the ranching operations?

A. Not that I know of.

Q. But Miss Hattie Kulamanu Ward has an interest in the land? A. In the land.

Q. Have there been any profits from that operation? A. None.

Q. Did the Hawaiian Trust Company representatives give you any reason to believe that corrected or amended returns should be filed for the years 1945, 1946 and 1947? A. No.

Q. Do those returns reflect fully the income and deductible losses of Hattie Kulamanu Ward?

A. They do.

Q. And you stand ready at all times to permit the Hawaiian Trust Company as guardian to examine any and all papers you have in your office

(Testimony of Henry C. Hapai.)

relating to the estate of Hattie Kulamanu Ward?

A. I do.

Cross-Examination

By Mr. Anthony:

Q. Mr. Hapai, do you have the check book?

A. I do not.

Q. Where is it? A. I don't know.

Q. You haven't been doing the business for Miss Lucy Ward? [232]

A. I collected what belongs to her and I deposit it in the bank. The spending of that money I have nothing to do with it.

Q. You have the tax returns of Hattie Kulamanu Ward in that file you have been talking about? A. I have.

Q. That is your personal property, is it?

A. That is my personal property.

Q. In other words, you insist you own——

A. Anybody can look at it, but they can't take it away from my file.

Q. I see; except by order of this Court?

A. If you once take it away from my file, I have got no record.

Q. You say you don't know where the check book is?

A. Never had anything to do with it.

Q. Do you know whether or not Hattie Kulamanu Ward ever wrote any checks?

A. I saw a check, I think it was \$200, that she signed, for some donation to the Community Chest. I think that is the only one I can remember.

(Testimony of Henry C. Hapai.)

Q. All of her disbursements have been signed by Lucy Ward, isn't that right?

A. I don't know.

Q. Didn't you make up her tax return?

A. I make the tax returns and the checks are paid.

Q. You never examine any disbursements or checks?

A. Well, sometimes I do, but I can't remember whether she signed it. She must have signed the check to the tax people.

Q. You know where the canceled checks are kept? [233]

A. I think Miss Lucy has them.

Mr. Anthony: Maybe we had better ask Miss Lucy.

Redirect Examination

By Mrs. Bouslog:

Q. Have you seen the inventory which the Hawaiian Trust Company has filed in this case?

A. I have.

Q. Do you know where the Hawaiian Trust Company got the information to file this inventory of Hattie Kulamanu Ward? Did you confer with them and furnish them any information?

A. I furnished the Hawaiian Trust Company with the balance sheet of Hattie Kulamanu Ward as of before and after closing on December 31, 1948.

Q. Is this the copy of the document which you furnished them?

(Testimony of Henry C. Hapai.)

A. I think it is the same amount of shares; I see Alexander and Baldwin 140 shares. The only difference here, Hawaiian Commercial, it had here 504 shares. I have in my balance sheet 555. Then the Hawaiian Trust has Maui Agriculture Company 17 shares. That was the difference between, because there were three shares in the merger of Hawaiian Commercial and the Maui Agriculture. There were 3 shares of Hawaiian Commercial issued for 17 shares of the Maui Agriculture, which made 51 shares. Add 504 and 51 which made my balance sheet 555. That is the difference.

Q. So that this inventory filed by the guardian here was based upon information furnished by you?

A. It must have been copied from my balance sheet.

Q. Now, in respect to the property that is jointly owned by Hattie, Lucy and Kathleen, are joint records kept in respect to those [234] properties?

A. The income from the joint property, joint accounts.

Q. In other words, you have, for example, in your office a file dealing with a particular piece of property held in joint tenancy, and there is just one file for the three?

A. No, a different set of books for the joint account, which includes the properties held jointly.

Q. There is a set of books for the properties owned jointly? A. Yes.

(Testimony of Henry C. Hapai.)

Q. Then the profits from that particular property are divided at the end of the year?

A. No, deposited in the Bishop National Bank under a joint account; and the drawing of that joint account, I have nothing to do with that, but for taxation purposes at the close of the year I journalize from the joint account into the individual account the amounts that went into the joint account, and that is all the journal entry.

Q. The files and records in your office which you keep as an officer of the Victoria Ward, Ltd., and as accountant for Hattie Kulamanu Ward, where they deal with joint property the papers in the file pertain to the estates of all three sisters?

A. The joint account?

Q. Yes. A. Yes.

Q. Have you ever at any time refused to make available any papers requested by the Hawaiian Trust Company or its officers? A. No.

Q. Do you stand willing now without order of the Court to voluntarily permit the examination of the papers and records in your office which pertain to the estate and property [235] interests of Hattie Kulamanu Ward? A. Yes, I am.

Mrs. Bouslog: I have no further questions.

Mr. Anthony: I would like to ask Miss Lucy Ward a few questions.

(The witness was excused.)

Mrs. Bouslog: I will state at this time that Miss Lucy Ward will furnish to the Hawaiian Trust Company, pending further order of another Court

the check books of the Hattie Kulamanu Ward estate either drawn by Hattie Kulamanu Ward or drawn by herself.

Mr. Anthony: I would like to examine the witness, your Honor.

The Court: Swear the witness.

LUCY K. WARD

called as a witness, being first duly sworn, was examined and testified as follows:

Mrs. Bouslog: Are you calling Lucy as your witness?

Mr. Anthony: As a hostile witness under the statute.

Mrs. Bouslog: I would prefer to call Lucy and to question her and then you may cross-examine her.

Mr. Anthony: Under the statute I am entitled to call the witness, your Honor. You can do as you choose.

Mrs. Bouslog: The Court said the burden was on me and I was assuming my burden.

Mr. Anthony: You may go ahead and examine her then.

Direct Examination

By Mrs. Bouslog:

Q. First will you state your full name, please?

A. Lucy K. Ward.

Q. And you are the sister of Hattie Kulamanu Ward? A. I am.

Q. How long have you served as her attorney in fact? A. Oh, over 40 years, or more.

(Testimony of Lucy K. Ward.)

Q. You have managed her property and estate?

A. I have.

Q. At her request? A. At her request.

Q. And under consultation with her?

A. Always.

Q. Since January 13, 1949, when the Hawaiian Trust Company was appointed by this Court as guardian, what if anything have you done with respect to disbursements of any moneys by Hattie Kulamanu Ward?

A. I have done that through Mr. Hapai who has charge of all that.

Q. Since January 14th?

A. Oh, no, I haven't done anything.

Q. Have you personally out of your own moneys paid the expenses of maintaining Hattie Kulamanu Ward?

A. Yes, we have done it personally.

Q. Since the time of the appointment of the guardian? A. Yes.

Q. When you received this letter from the Hawaiian Trust Company dated February 14, 1949, did you instruct Mr. Hapai to give the Hawaiian Trust Company the information that they requested? A. I did.

Q. And did you have any indication from them that they were [237] not satisfied with the information that had been furnished to them?

A. I did. I told Mr. Hapai about it, and he in turn was taking it up with the Hawaiian Trust.

Q. Did you instruct Mr. Hapai to give every

(Testimony of Lucy K. Ward.)

assistance in respect to Kulamanu's property to the Hawaiian Trust Company?

A. Yes, but he didn't have to be told.

Q. He did anyway?

A. He did it anyway.

Q. You own jointly, or you purchased jointly with Hattie Kulamanu Ward in 1947 some property on Molokai? A. I did.

Q. Will you tell the Court what the Puuohoku Ranch is and who puts up the expenses for the operation of that ranch?

Mr. Anthony: I object to that as immaterial. It has nothing to do with the production of records.

Mrs. Bouslog: Mr. Anthony, your client has requested——

Mr. Anthony: All right, I will withdraw it. I don't want to listen to a half hour of this explanation.

(The question was read by the reporter.)

A. The Puuohoku Ranch is, we are raising cattle. We are raising taro, too. I have furnished, paid for the ranch hands, everything, in fact. Kulamanu hasn't figured in anything of that sort.

Q. Have there been any profits from the operation of that ranch?

A. No, there have been losses.

Q. And the capital invested in the actual operations of that ranch has been your own? [238]

A. All my own.

Q. When was this property purchased?

(Testimony of Lucy K. Ward.)

A. Oh, it was in June, 1946.

Q. There hasn't been any income from that property since its purchase? A. No.

Q. What interest does Kulamanu have in the Molokai land?

A. In the Molokai land she has just the land interest. I have furnished everything over that. That is the cattle and all.

Q. She is joint owner with you of the land itself? A. The land itself.

Q. What, if any, division would be made of any profits from the operation of the ranch?

A. Personally, I feel half.

Q. In other words, it has been your intention when you have profitable operations there to pay to Kulamanu half of the proceeds of the operation of the business? A. Yes.

Q. Has Kulamanu ever been to the ranch?

A. Yes, she has been up there several times.

Q. What was your purpose, part of your purpose in buying the property and operating the ranch?

A. It was such a beautiful piece that I could see great prospects from it.

Q. Have you had offers equal to your purchase price for the sale of the land since the time you purchased it?

A. I purchased the land right from Mrs. Fagan, but Mr. Fagan after we had made the deal said to me, "Any time you want to sell, let me know, and I will take it off your hands." [239]

(Testimony of Lucy K. Ward.)

Q. Have you had other offers in relation to the property?

A. Well, to parts of the property, yes.

Q. How long have you engaged in business and management of property in the Territory?

A. Well, I should say about 30 years.

Q. Do you consider——

Mr. Anthony: We object to this. This has nothing to do with records. I would like to conclude this matter. It is a simple matter whether she has got the check book, or do we have to have a further proceeding to bring her up here. That is the substance of what we are getting at here.

Mrs. Bouslog: I would like to state, your Honor, that it was Mr. Anthony who read into the record a letter from the Hawaiian Trust Company which spoke of the Puuohoku Ranch which was highly critical of the operation which demanded and suggested the necessity for the sale of the ranch and inquired about the losses which might be attributable to Kulamanu's estate for the years 1946, 1947 and 1948.

The Court: Can't we get down to the question of what records, if any, she has that haven't been turned over?

Q. With the exception of the check books, where are the records, all the records you have in respect to Kulamanu's estate and the papers in respect to her estate?

A. They are down in Mr. Hapai's office.

Q. Where are the check books?

(Testimony of Lucy K. Ward.)

A. The check book is up in my office.

Q. Are you willing to turn over the check books of Kulamanu, affecting Kulamanu Ward's accounts to the Hawaiian Trust Company or to permit them to examine the records, where they are intermingled where you own joint property? [240]

A. Yes; yes.

Q. And some of the accounts on your joint property with Kulamanu and Kathleen are in one account?

A. Practically all are joint accounts. All of our accounts.

Q. So that it would be impossible to turn them over to the Hawaiian Trust Company without turning over your own and Kathleen's records?

A. Yes.

Q. But you are willing to permit them full, free and unhampered examination of the records that you have? A. Yes.

Q. Do you have any records and papers pertaining only to Kulamanu's property which would reflect, covering the last year or so period which you have not turned over or which Hawaiian Trust Company hasn't had a chance to examine in Mr. Hapai's office?

A. I think they have examined almost everything there at Mr. Hapai's office.

Q. You have no evidences of her property other than disbursements through her checking accounts and the joint checking accounts that you have just spoken about?

(Testimony of Lucy K. Ward.)

A. Yes, I just pay the bills, that's all.

Cross-Examination

By Mr. Anthony:

Q. Do you keep a separate checking account for Kulamanu? A. I do.

Q. How long have you kept this separate account?

A. Oh, the last 30 or 40 years or more than that.

Q. You have the canceled checks over a period of years [241] in your possession?

A. I have.

Q. Where are they?

A. They are in my office.

Q. And you have a check book that is current that relates exclusively to Kulamanu Ward?

A. I have.

Q. That is also in your office?

A. It is.

Q. You also have a check book that relates to the joint accounts of the three sisters, Kulamanu, Kathleen and yourself?

A. That is the joint account. Mr. Hapai has all of that.

Q. Does he have the canceled checks?

A. No, I have those.

Q. You have those? A. Yes.

Q. Do you have bank statements for these two accounts in your possession? A. We do, yes.

(Testimony of Lucy K. Ward.)

Q. And they go back over a period of years, do they not? A. Indeed yes.

Q. You are an officer of Victoria Ward, Ltd., are you not? A. I am.

Q. And Mr. Hapai is likewise an officer?

A. He is an officer.

Q. Salaried officers? A. Salaried officers.

Q. What does he get? A. Mr. Hapai?

Q. Yes. [242]

A. He gets the same amount as we gave him before he became an officer, and that is \$750.

Q. 7% of what? A. I didn't say 7%.

Q. He gets what? A. \$750.

Q. A month? A. A month, yes.

Q. You draw a salary? A. Not now.

Q. When did you stop?

A. When Edward Hustace arrived.

Q. What was your salary at that time?

A. \$575.

Q. Does Kathleen draw a salary?

A. She drew the same as I did.

Q. Any of the other sisters draw a salary?

A. No.

Q. Just you two and Mr. Hapai?

A. That's all.

Q. Does Mr. Hapai have a son that works for the corporation?

A. He does. He is a, it is an office of his own.

Q. Does he draw a salary from the corporation?

A. No, he does not.

Q. Never has? A. No, he never has.

(Testimony of Lucy K. Ward.)

Q. You are prepared to turn over these records that belong to the incompetent to the Hawaiian Trust Company, are you not?

A. I would like to have them gone over in my office, as they are not only mine. [243]

Q. Insofar as the records that belong to your sister Kulamanu you understand that you have no business withholding those from the guardian then?

Mrs. Bouslog: Your Honor, I object to counsel on examining the witness telling her what she has a right to do and what she has a right not to do.

Mr. Anthony: Isn't that true, Mrs. Bouslog?

Mrs. Bouslog: I would like to have him ask his questions and proceed with the examination.

The Court: If she has any papers that are exclusively reflecting the property rights of the ward, Mrs. Bouslog, who should they be in the hands of?

Mrs. Bouslog: Miss Ward has stated that she is willing to permit, that she has always been willing to permit Hawaiian Trust Company to examine in her office the books and papers that pertain to joint accounts and that she will for the last several years turn over the accounts of Kulamanu that are exclusively hers.

Q. Do you have any correspondence relating to the affairs of your sister Kulamanu in your possession? A. No, I haven't.

Q. You have never written anything about her property to anybody as attorney in fact, from her?

A. I have taken it up entirely with Mr. Hapai and we worked together on it.

(Testimony of Lucy K. Ward.)

Q. Then you do have correspondence in your possession that relates to the property interests of the incompetent, do you not?

A. That is in the joint account?

Q. Yes. [244] A. Yes.

Q. You have no correspondence that relates exclusively to Kulamanu's property?

A. I have not, because it is practically all a joint account, all our property.

Q. In other words, all of the income from Kulamanu's assets have gone into this joint account, is that it? A. Yes.

Q. And you are the person that draws the checks on the joint account?

A. She did it long ago once, but she can if she wants to.

Q. My question to you, Miss Lucy, is this: Are you the person that draws the checks on the joint account? A. Yes, I am the person.

Q. You have been doing that for a number of years? A. Yes.

Q. Does Kathleen draw on that account?

A. No, she does not.

Q. You are the sole one that draws on that account? A. Yes.

Mr. Anthony: No further questions. I renew the request that an order be entered. We can do nothing short of an order of the Court.

(Testimony of Lucy K. Ward.)

Redirect Examination

By Mrs. Bouslog:

Q. Miss Lucy, how long have you held this property that has been jointly held, how long has it been jointly held by you, Hattie and Kulamanu?

A. The Old Plantation is one that I have held since my mother's death. [245]

Q. When did your mother die?

A. She died in 1935.

Q. And most of your joint property with your sisters Kulamanu and Kathleen is property left to you jointly by your mother? A. Yes.

Q. And it has been managed as joint property since that time? A. Yes, always.

Q. And the income of it deposited in the joint account? A. Joint account, yes.

Q. And that joint account has been used in part to keep up the property where you live?

A. It is, yes.

Q. To keep the house in repair?

A. The house in repair, and also the lower portion Victoria Ward Ltd., I was in that also.

Q. Is that account used to pay the salaries of household employees? A. Yes.

Q. And food?

A. Food, yes; everything.

Q. In other words, how long have you, Kathleen and Kulamanu lived together in the Old Plantation?

A. Oh, as long as mother owned it. We lived with mother first and then afterwards.

Q. And that arrangement about the joint ac-

(Testimony of Lucy K. Ward.)

count, did that exist before the death of your mother in 1935? A. That we lived together?

Q. That you lived together and paid expenses this way out of the joint account. [246]

A. The joint account, we didn't have it then, until mother's death.

Q. Then you established the joint account?

A. Yes, the three of us.

Q. Was that with the knowledge and approval of Kulamanu? A. Indeed, yes.

Q. And you say you are willing without an order of the Court to turn over to the Hawaiian Trust Company the bank statements belonging exclusively to Kulamanu's account?

A. Yes; how far back do you want it?

Mrs. Bouslog: Your Honor, I think we should limit the order to the last three years.

The Court: Finish the examination and then we will discuss it.

Q. You are willing to permit a representative of the Hawaiian Trust Company to examine all records pertaining to the joint account in the office of Victoria Ward Ltd. on King St.?

A. Yes.

Examination by the Court

Q. Do I understand, Miss Ward, that there is an office of Victoria Ward Ltd. somewhere?

A. Yes, it is on King Street, the Rice Building.

Q. Is there a separate office that you keep of your own, separately and distinct from Victoria Ward? A. No, Victoria Ward, Ltd.

(Testimony of Lucy K. Ward.)

Q. You indicated that your check books and all that business were in your office. Is that a different office? A. No, it is the same office.

Q. The same building, and accessible to anyone that goes up there? A. Yes. [247]

Q. Are your accounts where they can be gotten at during reasonable business hours?

A. Not entirely because all the books and things, all taxes, and all of that are taken care of by Mr. Hapai.

Q. But these check books, where are they?

A. Those are in the office.

Q. Are they available for inspection during reasonable business hours?

A. Oh, yes; yes indeed. But I would like one person; I don't want the whole Hawaiian Trust to appear on the scene.

The Court: I can understand that you don't want the Republican and Democratic conventions being held up there.

Mrs. Bouslog: Your Honor, I think that the examination of the check books and accounts should be limited as to reasonableness of time.

Mr. Anthony: May we finish the examination of the witness?

Recross-Examination

By Mr. Anthony:

Q. Some of the records are in Mr. Hapai's office? A. Yes, the tax records.

Q. Where is that? A. Tax records.

(Testimony of Lucy K. Ward.)

Q. Where is that? A. Mr. Hapai's office.

Q. Where, what street?

A. Merchant Street, Schuman Building, Number 9.

Q. On Merchant Street?

A. Merchant Street.

Q. And the other records you refer to are in the office of [248] Victoria Ward Ltd.?

A. Yes, in the Rice Building.

Q. So the records are at two offices?

A. Yes.

Q. And you have none at your home?

A. No.

Mr. Anthony: That's all.

(The witness was excused.)

Mrs. Bouslog: On the showing made I think it is apparent, your Honor, that it isn't necessary for this Court to enter any order for the turning over of records and papers, that the records and papers in the office of Mr. Hapai have been made available to the Hawaiian Trust Company and its representatives. Lucy Ward has stated to this Court that she is willing voluntarily to permit examination of the accounts, of the check records, of the joint account and to turn over the accounts that pertain wholly to Kulamanu's estate. I think that under the circumstances shown here, the hostile, adverse character of this motion, it is apparent that it is not necessary and that in the interest of fairness I think that it is not necessary at this time for

the Court to make any order until there is a showing of an unwillingness to turn over without the necessity of an order being entered.

Mr. Anthony: Your Honor, we have a statute that relates to the concealment and withholding of records of an incompetent. This person has been in continuous violation of the statute since the date of appointment.

Mrs. Bouslog: There has been no such showing, your Honor. We have shown—— [249]

Mr. Anthony: Let me finish. You may address the Court when I am finished, Mrs. Bouslog. The witness on her own testimony says that she has got records exclusively relating to the property of the incompetent in her possession. She is under a statutory duty to promptly deliver those to the guardian and she has failed to do so. Now I say that under the circumstances we cannot ask for less than an order of this Court. It is entirely proper. She knew that she had those check books in her possession over a period of years, and yet she failed to turn them over even after receipt of the letter from the Hawaiian Trust Company of February 14th; and I say we are entitled to the order.

Mrs. Bouslog: In view of the fact that Mr. Anthony has made no showing of any kind of a refusal to cooperate with and to permit examination of the records, for him to have the audacity on the showing made to say to this Court that Lucy Ward has concealed the assets or the records of her sister when she keeps an open place of business in business hours, when the Hawaiian Trust Company and its

representatives have made use of those records and of those hours is wholly unwarranted, and I think that on the assurance of Miss Ward, that this Court does not need at this time to make any order whatsoever; that there has been an offer of full cooperation, and we have shown full cooperation in the past, and this is an unnecessarily insulting procedure which Mr. Garner Anthony chooses in this case to propose. This is part of the technique in opposition to the removal of the Hawaiian Trust Company as guardian to turn around and blacken and cast slander on the character of Miss Lucy Ward who has for many years managed the property. No [250] order is necessary, and I ask the Court to leave the matter in status quo, and on the statements of the witnesses here in court it is apparent that the information will be furnished.

The Court: I think that Miss Lucy Ward is entitled to have a clear statement from the Court without confusion of either counsel that she has a duty to perform in making available either at her own offices or through any of her agents, an inspection of all documents, check books and other papers that would reflect the business of the estate of the incompetent, and that upon such inspection any documents that are peculiarly and singularly the documents reflecting Hattie Kulamanu Ward's affairs should be made available if they are so segregated and found to be the incompetent's property that the papers be turned over to the guardian, and that copies of all other documents be permitted to be made at the usual business hours, and that that

direction should obviously be made so that Miss Ward knows that that is a duty she has to comply with, especially in connection with canceled checks, check books that reflect solely the personal business of Hattie, and inspection of the joint check books. As to all the check books and stubs and canceled checks in which Hattie's interests are affected; that whether they are in the possession of Mr. Hapai, her agent, or whether they are in her own possession, they should be made open and available.

The Court cannot at this time specify what documents as individual documents shall be finally turned over to the guardian because of the fact that there is an obvious confusion of matters in connection with the interests of all three sisters; but that that can be ascertained on the inspection, [251] and if there is any dispute between the parties as to who should be the custodian, then that can be brought to the attention of the appropriate court for settlement.

The Court is prepared to issue a general order that would require Miss Lucy to make available all papers pertaining to the, exclusively pertaining to the property of the ward, and make available for inspection all other documents and papers in which the ward's interests would be reflected so that ascertainment of information may be made available.

Mrs. Bouslog: Your Honor, I think the issuance, knowing as the Court knows that Mr. Anthony applied for this order as part of the strategy of opposing the motion and that there has been no

showing of the necessity for such an order, that the issuance of the order is improper.

The Court: The necessity is obvious from the non-voluntary compliance with the duty.

Mrs. Bouslog: I would like to have the Court limit the period of time in respect to the examination of records of the affairs of the Wards.

Mr. Anthony: I think that is reasonable, your Honor. I suggest after the death of Victoria Ward.

Mrs. Bouslog: Mr. Anthony has already suggested a moment ago, or Mr. Mahn when he was on the stand, said he needed them for a period of four years. I submit that is an unreasonable length of time. I suggest for a period of two years, the prior two years; there could be no need other than that.

Mr. Anthony: Your Honor, if your Honor is inclined to listen to my suggestion, may I point out before [252] the Court rules, on the showing here made and the showing heretofore made, Kulanu has been incompetent for years.

Mrs. Bouslog: There is no such showing in the record, and I object to that misrepresentation of counsel.

Mr. Anthony: You weren't here, Mrs. Bouslog.

The Court: The record before the Court at the time I have indicated, Mrs. Bouslog, justifies the inference that Hattie has not been competent to run her own affairs for years.

Mrs. Bouslog: Yes, but your Honor refuses to permit other competent expert testimony to show that your Honor did not have a full and complete picture at the time you drew your conclusions.

The Court: I am not going back into that feature of it. But the point is I am not at the present time going to limit the inspection to a number of years over which I have no information as to what will be necessary to find the roots of the inquiry. I am not in the business of knowing that, but the fact is that it should be done in reasonable business hours is to satisfy the guardian that the information has been obtained with the necessary efficiency. That is something that they will have to do, not I, and I can't restrict them to any short term of years but rather leave it to an open inspection of records at the present time limited to the period since the death of the mother, but not necessarily indicating thereby that they have got to go into all those records that far.

Mrs. Bouslog: When Mr. Mahn was on the stand he said all he needed was four years.

The Court: That may be all that they will undertake, [253] Mrs. Bouslog. I would say not to swim the river until you see the width.

Mrs. Bouslog: I would like to note an appeal from the Court's ruling that the issuance of an order is necessary in this case, and also from the refusal of the Court to grant a stay of the voting by Hawaiian Trust Company of the stock of Victoria Ward Ltd. pending the appeal to the Supreme Court in this case. [253-A]

Concluding Remarks of the Court

The Court: Now, Mrs. Bouslog, I must say something in connection with your careless use of the truth. You have accused this Court of bias and prejudice against Miss Lucy Ward. While she is present within the hearing of my voice, I want to have her understand that that accusation is out of your mouth, but as far as the Court is concerned, Miss Lucy Ward as a person stands before the Court with the same consideration that I would give to anyone else, but I have had to make certain observations and inferences from the record as justifiable conclusions from the record which are not personal or in any way reflect any hostility in the Court's mind against your client. But I do certainly take issue with the distortion of truth that you have used in failing to answer and evading the questions of the Court, and I will say that in the presence of the audience, but it is not a bias or prejudice against your client, but I am certainly not in favor of the careless use of the truth from the record that has been obvious in the proceedings here by you, Mrs. Bouslog.

Mrs. Bouslog: May I speak, your Honor?

The Court: The Court has made it a matter of record, and I don't care to have any further argument or statement from you.

Mrs. Bouslog: I think it is unfair.

The Court: You may sit down, Mrs. Bouslog.

Mrs. Bouslog: I take exception to the remarks of the Court. I think the Court, from the very statements he made—I have read the record, your

Honor—from the statements that have been made, that on the basis of a very short record this Court draws conclusions over a period of 50 years, and accuses Miss Lucy Ward of mismanaging her affairs and concealing the incompetency of her sister whom she has given love and care, would manifest bias and prejudice against Miss Lucy Ward.

The Court: I haven't accused Miss Ward of stealing from her sister. That is your language. I have carefully refrained from any personal aspersions on the character of Miss Lucy Ward, but she has been caught in a situation where the situation speaks for itself and justifies the conclusions the Court has made.

There is nothing further before the Court except to sign the orders upon presentation.

(The hearing was concluded.)

Reporter's Certificate

I, L. T. Chaffee, Official Court Reporter for the Territory of Hawaii, do hereby certify that I wrote in shorthand the above proceedings and that the foregoing transcript is true and correct.

/s/ L. T. CHAFFEE.

[Endorsed]: Filed Circuit Court T.H., April 26, 1949. [256]

In the Supreme Court of the Territory of Hawaii

No. 2761 and No. 2762

[Title of Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the supreme court of the Territory of Hawaii, do hereby certify that the foregoing documents listed in the index hereto attached are full, true and correct copies of the certified copies and of the originals on file in the above-entitled court and causes. I further certify that the transcripts of testimony, No. 1093, are certified copies in accordance with the certificates of the reporters, filed in said court and causes. I further certify that all documents listed in said index are attached hereto.

I further certify that the cost of the foregoing transcript of the record on appeal to the United States Court of Appeals for the Ninth Circuit is \$47.49, and that the said amount has been paid by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the supreme court of the Territory of Hawaii, at Honolulu, this 5th day of June, 1951.

/s/ LEOTI V. KRONE,
Clerk.

[Endorsed]: No. 12967. United States Court of Appeals for the Ninth Circuit. Lucy K. Ward, next friend of Hattie Kulamanu Ward and Lucy K. Ward and Kathleen Ward, Appellants, vs. Lanie W. Booth and Mellie E. Hustace and Hawaiian Trust Company, Limited, in its Corporate capacity and as Guardian of the Estate of Hattie Kulamanu ward, Appellees. Transcript of Record. Appeal from the Supreme Court of the Territory of Hawaii.

Filed June 8, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit
No. 12967

In the Matter of
THE GUARDIANSHIP OF HATTIE KAULA-
MANU WARD,

An Incompetent.

(Appeal from the Circuit Court, First Judicial Cir-
cuit, the Honorable Albert M. Cristy, at Cham-
bers in Probate No. 15530.

and

Error to the Circuit Court, First Judicial Circuit,
the Honorable Albert M. Cristy, at Chambers in
Probate No. 15530.)

Upon Appeal from the Supreme Court of the
Territory of Hawaii

POINTS UPON WHICH APPELLANTS RELY

The appellants Lucy K. Ward, next friend of
Hattie Kulamanu Ward, and Lucy K. Ward and
Kathleen Ward, through Harriet Bouslog, of
Bouslog & Symonds, their attorneys, hereby adopt
their assignments of error appearing in the [258]
transcript of the record as the points upon which
they intend to rely on appeal.

Dated: Honolulu, T.H., this 17th day of May,
1951.

BOUSLOG & SYMONDS,

By /s/ HARRIET BOUSLOG,
Attorneys for Appellants.

Service of a copy of the above acknowledged, this 18th day of May, 1951.

ROBERTSON, CASTLE &
ANTHONY,

By /s/ J. GARNER ANTHONY,
Attorneys for Appellees.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

The appellants, Lucy K. Ward, next friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward, through Harriet Bouslog, of Bouslog & Symonds, their attorneys, [261] designate the entire transcript of the record in this cause for printing.

Dated: Honolulu, T.H., this 17th day of May, 1951.

BOUSLOG & SYMONDS,

By /s/ HARRIET BOUSLOG,
Attorneys for Appellants.

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUCY K. WARD, Next Friend of Hattie
Kulamanu Ward, and LUCY K. WARD
and KATHLEEN WARD,

Appellants,

vs.

LANI W. BOOTH and MELLIE E.
HUSTACE and HAWAIIAN TRUST
COMPANY, LIMITED, in Its Corpo-
rate Capacity and as Guardian of the
Estate of Hattie Kulamanu Ward,

Appellees.

Appeal from the Supreme Court of the
Territory of Hawaii

APPELLANTS' OPENING BRIEF

BOUSLOG & SYMONDS

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FILED

OCT 29 1951

PAUL P. O'BRIEN
CLERK





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United States Court of Appeals

FOR THE NINTH CIRCUIT

LUCY K. WARD, Next Friend of Hattie
Kulamanu Ward and LUCY K. WARD
and KATHLEEN WARD,

Appellants,

vs.

LANI W. BOOTH and MELLIE E.
HUSTACE and HAWAIIAN TRUST
COMPANY, LIMITED, in Its Corpo-
rate Capacity and as Guardian of the
Estate of Hattie Kulamanu Ward,

Appellees.

Appeal from the Supreme Court of the
Territory of Hawaii

APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal pursuant to Section 1293 of the New Judicial Code from a final decision of the Supreme Court of the Territory of Hawaii made and entered on February 2, 1951 (R. 63-80, 104-105), rehearing denied on April 18, 1951 (R. 102-103), in two cases consolidated for hearing, argument and decision by the court below (R. 61-62). Notice of appeal to this Court was filed in the court below on May 17, 1951 (R. 3) and a petition for appeal was filed and allowed on May 17, 1951 (R. 4-16).

By appeal in cause No. 2761 (R. 52) in the court below, and by writ of error in cause No. 2762 (R. 53), appellants unsuccessfully sought reversal of orders of the Circuit Court of the First Judicial Circuit, at Chambers, in Probate, the Honorable Albert M. Cristy presiding, appointing the Hawaiian Trust Company, Limited, Guardian of the Estate of Hattie Kulamanu Ward, vacating the appointment of Lucy K. Ward as next friend of Hattie Kulamanu Ward, vacating a restraining order against the Hawaiian Trust Company, Limited, and denying without hearing on the merits a motion to vacate the order appointing the Hawaiian Trust Company, Limited, as such guardian, or to remove it, and for other relief. Jurisdiction of the court below was based on Chapters 182 and 186 of Revised Laws of Hawaii, 1945.

The petition for appeal and assignments of error set forth facts showing jurisdiction of this Court under Section 1293 of Title 28 of the United States Code in that the case involves the Constitution of the United States and in that the value in controversy exceeds \$5,000.00 (R. 10-16).

STATEMENT OF THE CASE

Factual Background

Hattie Kulamanu Ward, the alleged incompetent, who appeals by Lucy K. Ward, next friend, is a woman of approximately eighty years of age, and is the owner of property in the Territory of Hawaii of the value of approximately one million dollars.

Appellants Lucy K. Ward and Kathleen Ward are sisters of Hattie Kulamanu Ward. Appellees Lani W. Booth and Mellie E. Hustace are likewise sisters of Hattie Kulamanu Ward. These four sisters and Cenric Nourse Wodehouse, only child of a deceased sister, Mae Wodehouse, are the heirs apparent of Hattie Kulamanu Ward.

Appellee, Hawaiian Trust Company, Limited, was appointed guardian of the estate of Hattie Kulamanu Ward by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at Chambers, in Probate, the Honorable Albert M. Cristy, presiding. The legal propriety of this appointment is the primary issue involved in the proceedings.

Appellants Lucy K. Ward and Kathleen Ward and Hattie Kulamanu Ward have lived together in close and harmonious relationship during the entire life of the three of them, at an estate known as the Old Plantation. A considerable portion of the estate of Hattie Kulamanu Ward consists of her interest in the Old Plantation, which she holds as joint tenant with her sisters Lucy and Kathleen, with rights of survivorship.¹ This estate consists of approximately 23 acres of land closely adjacent to downtown Honolulu, a large portion of which is occupied by the three sisters as their home, and the remaining portions of which have been developed as business and industrial property and produce substantial income for the three sisters.

For a number of years prior to January, 1949, Lucy K. Ward assisted her sister, Hattie Kulamanu Ward in the management of her property, acting as attorney in fact.

In July, 1947, Lucy K. Ward, for herself and her sister Hattie Kulamanu Ward, acquired as joint tenants with rights of survivorship a large ranch on the Island of Molokai, investing for that purpose \$200,000 of her own funds and a like amount of her sister's funds. The money for the purchase of the ranch was secured by pledging securities of the two sisters for a bank loan. The propriety of this transaction was questioned by appellees and by the circuit judge.

In addition to stocks and bonds in various business cor-

¹ This property was deeded to the three sisters jointly, with rights of survivorship, by their mother, Victoria Ward, over twenty years ago. Lani W. Booth and Mellic Hustace have no interest in this property.

porations, Hattie Kulamanu Ward is the owner of shares of stock in a family corporation known as Victoria Ward, Limited, which has substantial land holdings closely adjacent to downtown Honolulu. Prior to March, 1949, Lucy K. Ward and Kathleen Ward were officers and managing directors of this family corporation. Hattie Kulamanu Ward was likewise a director. The 5,200 shares of issued and outstanding stock of Victoria Ward, Limited, are held as follows:

Hattie Kulamanu Ward, daughter of Victoria Ward.....	1,230 shares
Lucy K. Ward, daughter of Victoria Ward.....	1,222 shares
Kathleen Ward, daughter of Victoria Ward.....	1,222 shares
Cenric Nourse Wodehouse, son of Mae Wodehouse, deceased, daughter of Victoria Ward.....	642 shares
Lani W. Booth, daughter of Victoria Ward.....	874 shares
Mellie E. Hustace, daughter of Victoria Ward.....	10 shares

In 1948, a rupture occurred in the Ward family relations over the discharge by Lucy K. Ward and Kathleen Ward of Edward Hustace, grandson of appellee Mellie E. Hustace, as an employee of Victoria Ward, Limited, and on November 20, 1948, appellees Lani W. Booth and Mellie E. Hustace filed a petition in the Circuit Court of the First Judicial Circuit, at Chambers, in Probate, to have Hattie Kulamanu Ward declared insane and a guardian appointed for her. They sought and obtained the appointment of the Hawaiian Trust Company, Limited, as such guardian.

Appellants opposed the appointment of the Hawaiian Trust Company as such guardian. In the hearing on the guardianship petition, through counsel, Lucy K. Ward and Kathleen Ward asked for the appointment of Lucy K.

Ward, or in the alternative Kathleen Ward, as guardian of Hattie Kulamanu Ward. When this request was denied, counsel asked for the appointment of any trust company other than the Hawaiian Trust Company.² Subsequently, after the appointment of the guardian, by verified motion, Lucy K. Ward, as next friend of Hattie Kulamanu Ward, sought a further hearing on the issue of competency and asked that if after further hearing the court still felt a guardian was necessary, that she, Lucy K. Ward, or Kathleen Ward be appointed. If the court, after hearing of the motion, found neither were suitable, or that they had conflicting interests, the court was asked to appoint any disinterested person with knowledge of the affairs of Hattie Kulamanu Ward.

The verified motion alleged that the Hawaiian Trust Company had antagonistic and conflicting interests with the estate of Hattie Kulamanu Ward and with Victoria Ward, Limited, and alleged further that its appointment as guardian would, by reason of its control as such guardian of the pivotal shares of stock owned by Hattie Kulamanu Ward in Victoria Ward, Limited, and by reason of its alliance with petitioners, result in the ouster of the existing management of the family corporation, without the court being fully apprised of the facts involved in the dispute.

² At the hearing on the petition for the appointment of a guardian, Lucy K. Ward, as an intervenor, was represented by Attorney Wendell Carlsmith, and appellant Kathleen Ward was represented by Attorney Phil Cass. Neither Lucy nor Kathleen Ward was present in person. Attorney Carlsmith raised no objection to the appointment of the Hawaiian Trust Company, Limited, as guardian. Attorney Cass, however, spoke on behalf of both Kathleen and Lucy Ward, and opposed the appointment of the Hawaiian Trust Co., Limited, asked for the appointment of Lucy or Kathleen Ward as guardian, and after the court indicated that he would not appoint either of them, the appointment of any trust company other than the Hawaiian Trust Company, Limited (R. 118-143, particularly 137-138, 141). When the verified motion to remove the guardian came on for hearing, an offer of proof was made to show that Attorney Carlsmith had not carried out his instructions (R. 182).

The control of Victoria Ward, Limited, by petitioners was alleged to be the motive of petitioners in seeking to have Hattie Kulamanu Ward declared insane, and to have their nominee, the Hawaiian Trust Company, Limited, appointed as such guardian. It was further alleged that the appointment of the Hawaiian Trust Company, Limited, was not in the interest of Hattie Kulamanu Ward. The facts on which these allegations were based were fully set forth in the verified motion (R. 31-47).

Proceedings in Territorial Circuit Court

When Hattie Kulamanu Ward did not appear on the return day of the guardianship petition, a guardian ad litem was appointed. The petition was heard on January 13, 1949. When Attorney Cass sought to cross-examine witnesses for the petitioners, Judge Cristy ruled that Kathleen Ward and Lucy K. Ward had no standing to object to the appointment of the Hawaiian Trust Company, Limited, and that they had conflicting interests as a matter of law, and that he would not consider their appointment.

When Attorney Cass sought to cross-examine witnesses for the petitioners as to their motives for the filing of the petition, and in seeking the appointment of the Hawaiian Trust Company, Limited, as guardian, Judge Cristy ruled motive irrelevant. Attorney Cass, on behalf of Kathleen and Lucy K. Ward, sought the appointment of any trust company other than the Hawaiian Trust Company. The guardian ad litem stated that the Hawaiian Trust Company, Limited, might have conflicting interests with the estate, but recommended its appointment. No finding of service on Hattie Kulamanu Ward was made,³ nor was any finding made that she was an insane person, nor any decree entered to that effect, by Judge Cristy. No guardian of the

³ The only showing of service appears in the Bailiff's Return (R. 25).

person was appointed, it appearing that there was no necessity as she was being well cared for by Lucy K. Ward and Kathleen Ward. On January 14, an order appointing the Hawaiian Trust Company, Limited, as guardian of the estate was entered.

On Saturday, March 12, 1949, Lucy K. Ward, through present counsel, applied to the court⁴ for an order appointing her as next friend of Hattie Kulamanu Ward for the purpose of representing her in a motion to vacate the order appointing the Hawaiian Trust Company, Limited, as guardian of Hattie Kulamanu Ward, and for other relief.⁵ The motion for appointment as next friend was supported by an affidavit of Lucy K. Ward alleging, among other things, that it was necessary for a next friend to be appointed to represent Hattie Kulamanu Ward because she had been declared incompetent and the appointed guardian could not prosecute the action because it was adversary to the guardian. Upon the entering of such an order, Lucy K. Ward, next friend of Hattie Kulamanu Ward, filed a verified motion to vacate the order appointing the guardian and for other relief.

Pursuant to the prayer of the motion, a temporary restraining order was entered, enjoining the Hawaiian Trust Company, Limited, from voting the stock of Victoria Ward, Limited, belonging to the estate of Hattie Kulamanu Ward until further order of the court, and an order to show cause issued against all appellees returnable on the following Wednesday, March 16, 1949.

The verified motion to remove the guardian and for

⁴ Judge Cristy being absent because of illness, the matter was presented to the Honorable Willson C. Moore, and by him made returnable before Judge Cristy on the following Wednesday.

⁵ There can be no question that the proceeding for Hattie Kulamanu Ward by next friend is proper. *Kalanianaʻole v. Liliuokalani*, 23 Haw. 457; *Gray v. Parke*, 155 Mass. 433; *Ryder v. Topping*, 15 Ill. App. 216. See also as to right of next friend to appeal, *Fulmer v. Wilkins*, 37 S.E. (2d) 405.

other relief (R. 31-47) alleged that the order appointing the said guardian was entered without the court being fully apprised of the facts, and upon certain fraudulent representations and concealments of material fact, as a result of which a full and fair hearing had not been had. The verified motion and offers of proof made on the return day of the motion show in part:

1. That Hattie Kulamanu Ward had been examined by a reputable alienist, who found her competent to select the person she desired to manage her affairs.

2. That the motives of the two petitioning sisters, who sought to have Hattie Kulamanu Ward declared incompetent, were suspect for reasons fully set forth in the verified motion.

3. That the Hawaiian Trust Company had conflicting interests which made it an unsuitable guardian.

4. That Hattie Kulamanu Ward's property was and had been properly cared for by a person chosen by her, she having, according to proffered evidence, competence to select the person she wished to assist her.

5. That the appointment of the Hawaiian Trust Company as guardian would change the management of the family corporation, and that by so appointing the nominee of the two petitioning sisters, the Hawaiian Trust Company, the court was taking sides in a family dispute without any knowledge of the facts or merits of the respective sides in said dispute, and was not only depriving Hattie Kulamanu Ward of the right to manage her property and estate or select whom she desired to manage it, but was also effectively robbing Lucy K. Ward and Kathleen Ward—because of the unique circumstances—of the right to manage their own property without interference by a guardian unacceptable and antagonistic to them, or to have an impartial person or trust company not antagonistic to them and to their interests, and not committed to a course of

action against their wishes, participating in the management of the property which they jointly owned with Hattie Kulamanu Ward.

On March 15, 1949, appellees filed a return in effect denying the allegations of the verified motion.

On the return day of the order to show cause, Judge Cristy denied the motion without hearing on the merits, vacated the order appointing Lucy K. Ward next friend of Hattie Kulamanu Ward, and dissolved the temporary restraining order. Judge Cristy attacked the honesty and integrity of Lucy K. Ward, and accused her of coming into court with unclean hands, assisted by counsel. The court charged that the record indicated that Hattie Kulamanu Ward had been incompetent over a period of years, and that Lucy Ward, acting under a power of attorney, had mortgaged large amounts of her stock to take a joint tenancy in a ranch with rights of survivorship, thus feathering her own possible bed in case she survives her sister, to get into her hands property that has a value of some \$350,000 or \$400,000, and had "hocked" her ward's property.

Counsel stated that the comments of the court showed bias and prejudice against Lucy K. Ward, suggested to the court his disqualification, and asked him to permit the matter to be heard by another judge. Counsel pointed out that there was nothing in the record to indicate that Lucy Ward had done anything except to care properly and fully, free of charge, for her sister's property, and that the charges of concealing the incompetency of her sister, feathering her own nest, and hocking her sister's property were unsupported by any evidence in the record. An appeal was noted from the order vacating the appointment of Lucy K. Ward as next friend of Hattie Kulamanu Ward.

Proceedings in Supreme Court of the Territory of Hawaii

Thereafter, an appeal to the Supreme Court of the Territory of Hawaii was perfected by Lucy K. Ward, next

friend of Hattie Kulamanu Ward. This appeal was directed to all errors of fact and law apparent on the record from the time of her appointment as next friend by Judge Moore to and including the order vacating her appointment, dissolving the temporary restraining order, and denying the motion to vacate the appointment of the guardian or to remove it on the ground of unsuitability, under the provisions of Section 12529, Revised Laws of Hawaii, 1945.

A writ of error was also perfected to the Supreme Court of the Territory of Hawaii by (1) Lucy K. Ward, next friend of Hattie Kulamanu Ward, (2) Lucy K. Ward and Kathleen Ward, sisters of Hattie Kulamanu Ward who intervened by counsel in the incompetency proceeding. The writ of error was directed toward all errors of law apparent on the entire record, including the appointment of the guardian and the verified motion to vacate the appointment of the guardian or to remove it for unsuitability, and for other relief.

In the consolidated appeal and writ of error proceedings before the Supreme Court, appellants urged that:

1. Section 12509, Revised Laws of Hawaii, 1945, providing for the appointment of guardians of insane persons is unconstitutional because it does not provide for a jury trial of the issue of sanity in violation of the due process clause of the Fifth Amendment and the Seventh Amendment to the Constitution of the United States.

2. Errors of law and abuse of discretion apparent on the face of the record of the guardianship proceedings entitled appellants to a reversal of the order appointing the guardian. The specified errors were:

- a. The proceedings were defective because no finding of notice required by the statute was made by the probate judge.
- b. On the basis of the facts appearing in the record, the appointment of the Hawaiian Trust Company, Limited, was error of law and abuse of discretion.

- c. The refusal of the probate judge to permit examination of petitioners as to motive was prejudicial error.
- d. The ruling of the probate judge that the intervening sisters, Lucy K. Ward and Kathleen Ward, had no standing to object, and that they had conflicts of interest as a matter of law was error and abuse of discretion prejudicial to appellants.
- e. The appointment of a guardian of the estate of Hattie Kulamanu Ward was error of law because there was no finding that she was insane as required by Section 12509.

3. The probate judge abused his discretion in refusing to permit a hearing on the merits of the motion of the next friend of Hattie Kulamanu Ward to vacate the order appointing the guardian and to reopen the matter for further hearing on the issue of competency, and for other relief, on the record of the hearing on the petition and the facts set forth in the verified motion.

4. Appellant Lucy K. Ward, as next friend of Hattie Kulamanu Ward, was entitled as a matter of right to a hearing on that part of the verified motion which sought to remove the appointed guardian as unsuitable, and the probate judge's refusal to allow such hearing on the merits was error as a matter of law and an abuse of discretion which substantially prejudiced the rights of appellant.

5. By reason of the manifest bias and prejudice shown by the probate judge against appellant, Lucy K. Ward, as next friend of Hattie Kulamanu Ward, she was denied a full and fair hearing and deprived of due process of law on her verified motion to vacate the appointment of the guardian or to remove the guardian.

The Supreme Court of the Territory of Hawaii affirmed all the orders of the Circuit Judge at Chambers appealed from (R. 63-80). It ruled:

- 1. That the Seventh Amendment to the Constitution does not apply to guardianship proceedings in insanity cases.

2. That Section 12529, Revised Laws of Hawaii, 1945, dealing with the removal of guardians, operates only in the future and grants discretionary authority to remove an appointed guardian for events occurring after his appointment.
3. That the court need not consider questions in probate hearings at chambers which are not made the subject of exceptions, and will do so only if it is of the opinion that manifest error patently appears which injuriously affects substantial rights.
4. That the granting or denial of a hearing on the merits of a motion to vacate an order appointing a guardian is within the sound discretion of the presiding judge, and his denial will not be disturbed unless an abuse of discretion appears, and that no such abuse was shown.

A petition for rehearing and reargument, urging seven grounds for reconsideration by the court was filed. It was urged that on the basis of the allegations of the verified motion alone, the very minimum that equity and justice would require is that the probate judge remain neutral in the family dispute and appoint a neutral or impartial person or agency as guardian, and not one antagonistic to, or one committed to a course of action acceptable to participants on one side of the dispute.

It was further urged that federal courts which had considered the issue of the right to a jury trial on the issue of sanity had held that such right was guaranteed by the Seventh Amendment to the Constitution.

It was likewise urged that the court's holding that exceptions must be taken in probate proceedings at chambers in order to raise the questions as of right on appeal was contrary to all previous decisions of the court and the universal practice in the Territory.

Rehearing was denied in a brief *per curiam* opinion (R. 103).

SPECIFICATION OF ERRORS RELIED ON IN THIS COURT

Assignment No. 1

The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court," erred in making and entering its Opinion and Decision on the 2nd day of February, 1951, in the above-entitled Court and causes.

Assignment No. 2

The Court erred in making and entering its Opinion and Decision denying the Petition for Rehearing on the 18th day of April, 1951, in the above-entitled Court and cause.

Assignment No. 3

The Court erred in making and entering its Judgment on Writ of Error and Decree on Appeal, on the 5th day of May, 1951, in the above-entitled Court and cause.

Assignment No. 4

The Court erred in its conclusion that the Fifth and Seventh Amendments to the Constitution of the United States do not guarantee to person resident in the Territory of Hawaii, including Hattie Kulamanu Ward, who here appears by her next friend Lucy K. Ward, the right to a jury trial on the issue of sanity, and hence that Section 12509 of Revised Laws of Hawaii is valid and not in contravention of these Amendments.

Assignment No. 5

The Court erred in making and entering its Judgment on Writ of Error and Decree on Appeal in that Section 12509, Revised Laws of Hawaii, 1945, as construed and applied in these causes, denies appellants due process of

law in violation of the Fifth Amendment to the Constitution of the United States in the following respects:

a. As construed and applied, this section permits a finding of incompetency without a determination or finding of notice as required by statute.

b. As construed and applied, this section permits the appointment of a guardian ad litem for an adult alleged to be incompetent, without notice to the alleged incompetent.

c. As construed and applied, this section permits the appointment of a guardian which has or may have conflicting interest.

d. As construed and applied, this section permits appointment as guardian of nominee of two petitioning sisters, over the opposition of two intervening sisters with equal interests and equal rights.

e. As construed and applied, this section authorizes appointment of a guardian on petition of some relatives without allowance of a full and fair hearing to intervening relatives—with equal interests and rights, who opposed petition—in respect to motives of petitioners in seeking appointment of specific guardian.

f. As construed and applied, this section denies full and fair hearing to intervenors who have equal status with petitioners, and gives them no standing to object to the selection of a proposed guardian or to propose themselves or another guardian.

g. In that this section, as construed and applied, permits the appointment of a guardian without a finding of insanity.

Assignment No. 6

The Court erred in making and entering its Judgment on Writ of Error affirming the order appointing the Ha-

waiian Trust Company, Limited, guardian of the estate of Hattie Kulamanu Ward, and making and entering the Decree on Appeal affirming the order vacating the appointment of Lucy K. Ward, next friend of Hattie Kulamanu Ward, dissolving the temporary restraining order and denying the motion to set aside the order appointing the guardian or to remove the guardian, in that there is error and abuse of discretion which amounts to a denial to appellants of due process of law and a denial of a full and fair hearing on the basis of the allegations contained in the verified motion and the offers of proof made on the return day.

Assignment No. 7

The Court erred in refusing to consider on the merits certain assignments of error on the ground that they were not made the subject of exceptions, it being settled law in the Territory that in proceedings in chambers exceptions are unnecessary and that errors apparent on the face of the record may be corrected by writ of error regardless of the taking of exceptions.

Assignment No. 8

The Court erred in its conclusion that Section 12509 does not afford appellants, as a matter of right, a hearing on the merits of the motion to remove the Hawaiian Trust Company, Limited, as guardian on the ground of unsuitability.

Assignment No. 9

The Court erred in its conclusion that the manifest bias and prejudice shown by the circuit judge against appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, did not constitute a denial of a fair hearing of the motion to vacate the order appointing the guardian, or to remove the guardian.

STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED

I. The Fifth Amendment to the Constitution of the United States

No person shall . . . be deprived of life, liberty, or property, without due process of law.

II. The Seventh Amendment to the Constitution of the United States

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to a jury trial shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law.

III. Section 12509, Revised Laws of Hawaii, 1945

Notice, hearing and appointment of guardian of insane person. When the relations or friends of any insane person shall apply to any of the judges hereinbefore mentioned to have a guardian appointed for such person, the judge shall cause notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed. The judge shall also cause notice to be given to the husband, wife, parent, or any child or children of the supposed insane person, if any there be residing within the jurisdiction of the court. In case it shall appear by return of the summons or by affidavit to the satisfaction of the judge that no such person can be found, the judge may appoint a guardian ad litem to protect the interest of the supposed insane person and cause such notice to be given to such guardian ad litem. If after a full hearing it shall appear to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, with the powers and duties herein-after specified, and, in case of the appointment of a guardian ad litem, provide for the compensation and reasonable and necessary expenses of such guardian ad litem.

ARGUMENT

I. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN MAKING AND ENTERING ITS OPINION AND DECISION, IN DENYING THE PETITION FOR REHEARING, AND IN MAKING AND ENTERING ITS JUDGMENT ON WRIT OF ERROR AND DECREE ON APPEAL.

The specific reasons why error is alleged in these actions of the court and the legal grounds of such error are discussed under succeeding points. (Assignments of Error Nos. 1, 2 and 3.)

II. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS CONCLUSION THAT THE FIFTH AND SEVENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DO NOT GUARANTEE TO PERSONS RESIDENT IN THE TERRITORY OF HAWAII, INCLUDING HATTIE KULAMANU WARD, WHO HERE APPEARS BY LUCY K. WARD, HER NEXT FRIEND, THE RIGHT TO A JURY TRIAL, AND HENCE THAT SECTION 12509 OF REVISED LAWS OF HAWAII, 1945, IS VALID AND NOT IN CONTRAVENTION OF THESE AMENDMENTS. (Assignment of Error No. 4.)

The Seventh Amendment to the Constitution of the United States applies only to courts sitting under the authority of the United States (*Pearson v. Yewdall*, 95 U.S. 294, 296), including courts in the territories (*Webster v. Reid*, 11 How. 437, 460), and the District of Columbia (*Capital Traction Co. v. Hof*, 174 U.S. 1, 5). Thus, while a state might require less than a unanimous jury verdict (*Chicago, R. I. & P. R. Co. v. Ward*, 252 U.S. 18), a territory cannot. (*American Publishing Company v. Fisher*, 166 U.S. 464.)

There can be no question that a state is not prohibited by the due process clause of the Fourteenth Amendment from eliminating jury trials in insanity proceedings. Thus, in *Simon v. Craft*, 182 U.S. 427, the court said, concerning due process of law in insanity hearings:

The due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it.⁶

But since the Seventh Amendment is a limitation on the power of territories, and it is not a limitation on the power of the several states, the question in respect to Hawaii turns on whether the right to a jury trial in insanity proceedings existed at the time of the adoption of the Bill of Rights to the Constitution, and whether it is a suit at common law within the meaning of the Seventh Amendment. It cannot seriously be questioned that a jury trial was the recognized and accepted method of inquiring into insanity in England and the colonies, prior to the adoption of the United States Constitution.⁷

Thus, in Cooley's Blackstone (4th Ed.), vol. 1, page 261, it is said:

By the old common law there is a writ de idota inquirendo (of inquiring concerning an idiot), to inquire whether a man be an idiot or not; which must be tried by a jury of twelve men.

⁶ It is to be noted, however, that the issue of sanity in this case was in fact tried by a jury, even though the alleged incompetent was not present.

⁷ Appellees, in their brief before the Supreme Court of Hawaii, conceded that "Probably the procedure in most colonies at the time of the Revolution, if they had a procedure, included a jury though some may not." Appellees took the position, however, adopted by the Supreme Court that lunacy proceedings are not suits at common law within the meaning of the Seventh Amendment.

The same author, on page 263, says:

The method of proving a person non compos is very similar to that of proving him an idiot.

The same view is expressed by Buswell on Insanity, page 35, and in Pomeroy's Equity Jurisprudence, §1312.

The only discussion of this question by the Supreme Court of the Territory of Hawaii prior to the instant case appears in *In Re Atcherley*, 19 Haw. 535. It is there stated that the right to a jury trial in insanity proceedings has been claimed and enforced in Hawaii in only one case—*In Re Atcherley*, 19 Haw. 346. Thereafter, the court said, the Territorial legislature changed the law, the inference being that the legislature took the view that a jury of laymen was ill-qualified to hear and determine the question of whether or not a person is of sound mind, and therefore substituted new procedure.

The Supreme Court of the Territory, after noting that the United States Supreme Court has not specifically passed on this question, states that appellants have cited no clear authority of a lower court holding that a jury trial is a constitutional right in courts of the United States, including the District of Columbia and courts of the territories. To the contrary, it is respectfully shown that the federal cases which consider the problem reach the conclusion that a jury trial of the issue of competency in such courts must be had before a person can be deprived of his liberty and property.

Thus, in *Hager v. Pacific Mutual Life Insurance Co.*, 43 F. Supp. 22, the court said:

I do not believe that under our Federal and State Constitutions a person can be declared incompetent and have his property taken out of his hand or be placed in confinement without the intervention of a jury and the verdict of a jury declaring him to be non

sui juris. It seems to me that the statute is repugnant to our whole constitutional system.

The very fact that a person is insane or charged with being insane is equally as great if not even a greater reason to make the trial public and before a lawfully constituted jury than in the case of a person charged with crime. Nor should there be permitted a waiver of jury. Possibly without reason or capacity to properly select counsel or to defend himself a provision to permit a waiver of rights seems improper and on the same plane with the provision in Section 216aa-74 that he may demand a jury, which in my judgment is void.

In *In re Bryant*, 3 Mackay 489, 493-494 (Sup. Ct., D.C.), the court held that in the District of Columbia a jury trial was required before a person could be declared or held as a lunatic.

The court said:

This deprivation of the liberty of a citizen upon the ground of lunacy is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man might be sent to an asylum by his relations, upon a certificate of two physicians, and be illegally confined there for years.

We hold, therefore, first, that these sections of the Revised Statutes do not contemplate compulsory seclusion in this institution without due process of law. They only open its doors to those who have been properly found to be insane persons. *If they meant anything else they would be unconstitutional.* (Italics supplied.)

And, secondly, we hold that the whole matter of the care of insane persons is regulated by the act of Maryland of 1785, which includes this proceeding of an inquiry by jury.

And in *Burke v. Wheaton*, Fed. Case No. 2165, 3 Cranch C.C. 341, the court held that the mode of ascertaining who are lunatics is by jury trial upon the issuance by the court of a writ *de lunatico inquirendo*.

The Supreme Court of the Territory of Hawaii concedes that Section 12509 is in derogation of the common law, thus agreeing with appellants that at common law the method of declaration of incompetency differed from our statute in that it could be had only after a jury determined the issue of competency.

The first ten amendments to the Constitution of the United States, known as the Bill of Rights, were proposed by the First Congress at the insistence and demand of the people that personal rights and liberties established by common law at the time of the adoption of the Constitution could never be taken away or infringed upon by the federal government. Among these rights was the right to a jury trial in civil cases as it existed at common law. Even Congress cannot, by laws purporting to set up different legal remedies, deny persons the right to a jury trial as it existed at common law. *Raytheon Mfg. Co. v. Radio Corporation of America*, 76 F. (2d) 943, affirmed 296 U.S. 459, 80 L.Ed. 327.

The Seventh Amendment did not enlarge or abridge the right of jury trial as it existed at the time of the adoption of the Constitution. It guaranteed its preservation as it existed at common law in proceedings of a legal as distinguished from an equitable character. *Fitzpatrick v. Sun Life Assurance Co. of Canada*, 1 F.R.D. 713.

The Supreme Court of the United States has exhaustively examined the nature of the rights guaranteed by the Seventh Amendment.

In *Parsons v. Bedford*, 3 Peters 433, 446, 7 L.Ed. 732, Mr. Justice Story said:

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . By common law they meant what the Constitution denominated in the third articles "law"; not merely suits, which the common

law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. . . . In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, ch. 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided that "the trial of issues in fact in the district courts in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury;" . . .

See also discussion of authorities on meaning of Seventh Amendment in *Geneux v. Texas & Pacific Ry. Co.*, 98 F. Supp. 405; *People v. One 1941 Chevrolet*, 22 P. 2d. 473 (Cal. App.).

There seems no legal basis for questioning that the language of the Seventh Amendment means the same as the language in constitutions of the several states that "the right to jury trial shall remain inviolate."

Under such state constitutional provisions, the highest courts of a number of states, including the courts of New York, New Jersey, Pennsylvania, Vermont, Kentucky, and Texas, have held that the right to a jury trial existed at common law in insanity proceedings, and must be preserved.⁸

Maryland

It has long been held in Maryland that the method of determination of the issue of insanity remains in the State

⁸ Other courts have reached a contrary conclusion. See, for example, *Sharum v. Meriwether* (Ark.), 246 S.W. 501, *Ex Parte Scudamore* (Fla.), 46 So. 279.

of Maryland as it existed under English practice independent of statute.

The leading Maryland case, *Hamilton v. Traber*, 27 A. 229, pages 230 to 232, discusses at great length the history of writs *de lunatico inquirendo*, and determines that the English practice at common law required the trial of the issue by a jury. After the discussion of the English authorities, the court concluded:

It is repugnant to the plainest dictates of natural justice that one having no interest in or claim against the estate of another should still possess the right to procure a decree stripping the latter of the ownership of his property, and simultaneously adjudging him a lunatic, without the solemn inquisition of a jury, upon a mere *ex parte* allegation, and substantially *ex parte* proof, of the owner's mental infirmity. For such a proceeding no precedent has or can be found.

See also *In Re Bristor's Estate*, 81 A. 25, at page 28; *Ex Parte Bickell's Estate*, 149 A. 446, at page 449. In *Perdam v. Lily*, 35 A. 2d 805, the rule of the *Hamilton v. Traber* case is reaffirmed, the court holding that an adjudication of mental incompetency must be based on a finding of the jury under a writ of *de lunatico inquirendo*.

It is apparent that the practice at common law, as construed by the Maryland courts, was that the right to a jury trial was absolute, and could not be waived, it being a condition precedent to the appointment of a guardian.

New York

The leading New York case holding that the right to a jury trial of the issue of insanity is guaranteed by the Constitution of the State of New York preserving inviolate the right to trial by jury as it existed at the time of the constitution is *Sporza v. German Savings Bank*, 84 N.E. 406.

In the *Matter of Perkins*, 173 N.Y.S. 520, at 523, the court held:

In insanity cases, the alleged insane person is entitled to a trial of the question of fact, not only by the statute, but as a constitutional right. Jurisdiction over lunacy cases was originally exercised by the Court of Chancery, and the custom prevailed on the part of the chancellor, before the Constitution was adopted, to require a trial by jury of the question of the insanity of a person, and therefore that was one of the cases where jury trials were preserved by the Constitution.

To the same effect is *People v. Silleti*, 17 N.Y.S. 2d 947.

New Jersey

The leading New Jersey case is *Re McLaughlin*, 102 A. 439. There the court said:

When the framers of the Constitution inserted the paragraph providing the right of trial by jury should remain inviolate, they were fully advised of the common-law history of the method of determining the question of lunacy, . . . and intended to perpetuate the system which forbade the finding of lunacy unless by the verdict of a jury.

This case has been followed in *Leick v. Poznick*, 37 A. 2d 302, and *Oswald v. Seidler*, 39 A. 2d 396.⁹

In the *Oswald* case, the court said:

Only by a jury upon a commission from this Court can a person be declared as incompetent and be divested of all power and control of his affairs and estate. R. S. 3:7-35 et seq., N.J.S.A.; *In Re McLaughlin*, 87 N.J. Eq. 138, 102 A. 439.

⁹ In *In Re A.L.S.*, 63 A. 2d 321, it appears that even though the new constitution of New Jersey of 1947 allowed the legislature to prescribe other methods than jury trial to determine the issue of insanity, the legislature had not done so except in respect to estates involving less than \$2,000.00.

Pennsylvania

In *Commonwealth ex rel. Stewart v. Kirkbridge*, 2 Brewst. (Pa.) 419, it appeared that a person had been found to be insane in a proceeding held in Maryland, of which he claimed to have had no notice. The petitioner also claimed that he had been decoyed into an insane asylum in Pennsylvania; that, if he was in fact insane, his malady was not such as to justify his restraint. In passing on the propriety of his detention, the court said:

I hold to the doctrine that no man can be deprived of his liberty without the judgment of his peers, and that it matters not to the law whether the alleged cause of detention is insanity or crime. Unless there is danger to the public or to the patient or to his estate, he should not be in duress pending the investigation, nor indeed after its conclusion, though adverse to him.

Vermont

In *Shumway v. Shumway*, 2 Vt. 339, it was held that a person charged with insanity had the right to appeal from a determination that he was insane, made in a probate court without a jury, and have the issue of his sanity tried by a jury on appeal. The court said:

We are fully satisfied, from a view of the British authorities, that the aforementioned statute was made in view of them, intending to give to our citizens as much security for their liberty and property as is enjoyed by the subjects of Great Britain. The right of trial by jury is too well secured to have anyone arbitrarily deprived of a privilege so dear to every American citizen. Our independence cost too much to have our liberty and property wrested from us and we put under guardianship without even the form of a trial. Should we sanction these proceedings, no one in the evening of life could dwell secure, but would tremble at the approach of anyone that entered his door, lest he was then to be called to surrender all that would render life desirable.

Alabama

In *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266, it was held that appointment of a guardian for a lunatic without notice to the lunatic, and without the issue of a writ *de lunatico inquirendo*, and the verdict of a jury thereon is void.

The court said:

This appointment was made upon no other assurance of the fact of Mrs. Eslava's lunacy than the petition of her husband, without notice to her, and without the issue of a writ *de lunatico inquirendo*, and the verdict of a jury thereon. Without the issue of this writ and the finding of a jury, the county court judge had no power to declare her a lunatic, or to appoint a guardian for her. These proceedings are indispensable to give the county court jurisdiction to make the appointment; and as they were not had, and that court is one of limited jurisdiction, the proceedings on the appointment of guardians are *coram non judice* and void. . . .

There is no order of the county court of Mobile declaring Mrs. Eslava a lunatic or person *non compos mentis*. The nearest approach to it is found in the recitals of the order appointing the guardians, and these are wholly insufficient for that purpose. . . .

Tennessee

In *Johnson v. Nelms*, 100 S.W. (2d) 648, at page 651, the Supreme Court of Tennessee held that under the better authorities it seems to be conceded that the right to jury trial in lunacy proceedings existed at common law, and a statute which denies the right would be unconstitutional.

Kentucky

In *Howard v. Howard*, (Ky.) 1 LRA 610, an action was prosecuted by the plaintiff as next friend of a person he alleged to be of weak mind. The alleged incompetent came

in and denied his weakness of mind or incompetency. After observing that the common law guaranteed a right to jury trial, the court, in considering the proper procedure in such a case, said:

. . . It seems to us that the issue which thus involves his personal liberty should be settled by his peers—a jury of his country; and for that purpose the chancellor should issue his writ out of chancery, directing an inquiry by a jury into the fact as to whether the mind of the person was so impaired by age, disease or otherwise as to render him incapable of understanding and appreciating his property rights to such an extent as to render him unable to protect himself against designing persons; and upon the verdict of the jury, if in the affirmative, the chancellor should appoint a committee for the person, and allow him to prosecute the suit in his name; but if the verdict should be in the negative, then the suit should be dismissed. . . .

Daley v. Spencer's Committee, 83 S.W. (2d) 502, held specifically that the statute relating to the appointment of a committee in insanity proceedings requires the inquest of a jury as a condition precedent to the appointment of a committee for an alleged incompetent. The court further held that where the facts necessary to confer jurisdiction on the court were required to appear of record in order to sustain the order appointing a committee, and that since it appeared that there was no jury, the order appointing the guardian was absolutely void. The court says, at page 505, that it seriously doubted whether a jury could be waived in such proceedings. The court said:

Persons—even insane persons—are not to be deprived of their liberty or property without due process of law. While there is no hint of bad faith on the part of the appellants here, the Star Chamber methods of dealing with the person and property of this unfortunate woman cannot be too severely condemned. Con-

stitutional guarantees are to be honored and not ignored.

See also *Hager v. Pacific Mutual Life Insurance Co.*, 43 F. Supp. 22, discussed supra.

Texas

In *White v. White*, 196 S.W. 508 (Tex.), and *Loving v. Hazelwood*, 184 S.W. 355 (Tex.), the court held unconstitutional a statute providing that a commission rather than a jury should try the issue of lunacy. This rule was reaffirmed in *Beardon v. Texas Company*, 60 S.W. (2d) 1031. To the same effect, *Henderson v. Applegate*, 203 S.W. (2d) 548.

California

California has been one of the states holding, at least under commitments for insanity based on inebriation, that a jury trial is not a constitutional requirement. The rationale of the California cases is that insanity proceedings are not ordinary civil actions as defined by the California code, but are special proceedings. See *People v. Loomis*, 80 P. (2d) 1013. Yet, the California courts seem eager to discard the rule adopted by the earlier cases without, however, reversing the earlier cases.

Thus, in *Knight v. Superior Court*, 214 P. (2d) 21, a writ of prohibition was sought from the California District Court of Appeals, to prevent a hearing on incompetency without the intervention of a jury. The court said:

Two grounds to the opposition of the issuance of the writ are urged: "First, that as a matter of law the Superior Court is right and that the alleged incompetent has no right to trial by jury of that issue. Without reviewing the authorities, this court is definitely of the opinion that the trial court was in error in this respect. . . . It is our view that any court which denies the right of trial by jury in a case where any party

has the constitutional right to it exceeds its jurisdiction.

It is therefore ordered that the demurrer be overruled and that a peremptory writ of prohibition issue as prayed prohibiting the trial court from proceeding with trial other than by trial with a jury.

To the same effect see *Budd v. Superior Court*, 218 Pac. 2nd 103.

It is respectfully submitted that the right to a jury trial existed at common law, and that such a jury trial was a condition precedent to the depriving of a person of control of his property by the appointment of a guardian or committee, and that this right is guaranteed by the Seventh Amendment.

The Supreme Court has construed the Territorial statute as not providing or permitting a jury trial. It is therefore respectfully submitted that Section 12509, Revised Laws of Hawaii, 1945, is unconstitutional because it violates the provisions of the Fifth and Seventh Amendments to the Constitution.

III. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING ITS JUDGMENT ON WRIT OF ERROR AND DECREE ON APPEAL, IN THAT SECTION 12509, REVISED LAWS OF HAWAII, 1945, AS CONSTRUED AND APPLIED, DENIES APPELLANTS DUE PROCESS OF LAW IN THE FOLLOWING RESPECTS:

- A.** As construed and applied, this section permits a finding of incompetency without a determination or finding of notice as required by statute and by due process. (Assignment of Error No. 5a.)

Section 12509 requires notice to the supposed insane person. This notice is essential to the jurisdiction of the court to proceed. In *Re Estate of William Brash*, 15 Haw. 372. Since notice is jurisdictional, a finding of proper notice must be made by the court.

See: *McElroy v. Pegg*, 167 F. (2d) 688.

Shields v. Shields, 26 F. Supp. 211, 215.

People ex rel Spencer, 65 N.Y. 1, 4.

In *Hutchins v. Johnson*, 12 Conn. 376, it was held that the court must make a finding that proper notice was given of the application, and if there is no such finding the appointment of the guardian or conservator is void. The court said:

Another question arises: is this plaintiff a conservator? He has stated, that he was legally appointed; and, of course, he must prove it. The record of his appointment does not show that notice of application was ever given. Notice of such a proceeding, so important to the subject is required by the fundamental principles of justice: *Chase v. Hathaway*, 14 Mass. 224. . . . It would seem, then, as if it would result, as a matter of course, that a fact so important should be shown to the court, before they proceed; and that it must be found by them, before their proceedings can be valid. It is claimed, however, that this fact is proved by the files of the court, viz., the summons and the officer's return. We have held, that the return of an officer is only prima facie evidence, at least not conclusive, of the truth of the fact therein stated; if the return is to be considered as part of the record, the party is concluded by that which we have held not to be conclusive. If it is no part of the record, how is it to be tried in this court? We cannot impanel a jury to test the officer's return. Either way, therefore, the record can not be helped, by the files. We see no reason, if the court below were satisfied that the notice was given, why that fact should not have been found; and for want of such finding this court can not know of its existence.

Hattie Kulamanu Ward did not appear in the proceedings in response to the summons, and no reason was shown for her non-appearance in the record. See Woerner's *Trea-*

tise on the American Law of Guardianship of Minors and Persons of Unsound Mind, Section 119.

There is no finding of the court, at any point in the record, that proper notice was given.

In *Peterson v. Peterson*, 24 Haw. 239, the Supreme Court of the Territory of Hawaii held that it is an established rule that where a court of general jurisdiction is given statutory authority, the requirements of the statute must appear of record and will not be presumed. Specifically, that case holds that its jurisdiction over the person must appear of record.

Since this is a statutory proceeding by a court of limited jurisdiction, and since the record is silent as to the notice required by statute, the order appointing the guardian is void, and appellants were denied due process by the lower court's refusal to so hold.

B. As construed and applied, this section permits the appointment of a guardian ad litem for an adult alleged to be incompetent, without notice to the alleged incompetent. (Assignment of Error No. 5b.)

Section 12509 of Revised Laws of Hawaii, 1945, as construed by the courts below authorizes the appointment of a guardian ad litem before there has been a finding of insanity, and without notice to the alleged incompetent of such appointment. This is improper as a matter of law. See *Mussi's Guardianship*, 84 N.Y.S. (2d) 468; *Warrick v. Moore*, 291 S.W. 950, 956.

The very purpose of the proceeding is to determine insanity, and the appointment of a guardian ad litem presupposes the existence of legal incompetency. A person of legal age, not declared insane, is presumed sane. *Kalaniana'ole v. Liliuokalani*, 23 Haw. 457.

At the time when the guardian ad litem was appointed in this proceeding, the alleged insanity appeared only by the

verified petition. Woerner, Section 145, states the rule in such cases as follows:

But if the insanity has been suggested on affidavit, but not legally ascertained, and there is doubt whether proof can be successfully made, the court is without authority to appoint an attorney, and will continue the case to afford an opportunity for an inquisition.

It is respectfully submitted that the appointment of the guardian ad litem for Hattie Kulamanu Ward, at the outset of the proceedings, and without notice to her when she was deemed by law sane, is a violation of due process of law required by the Fifth Amendment to the Constitution of the United States.

C. As construed and applied, this section permits the appointment of a guardian nominated by the petitioning sisters and appointed over the objections of two sisters with equal interest where it affirmatively appeared that the guardian selected might have conflicting interests. (Assignments of Error Nos. 5c and 5d.)

After the appointment of the guardian ad litem in this case, instead of following the usual course of denying the petition and requiring strict proof (*Simon v. Craft*, 182 U.S. 427, 429), the guardian ad litem, after investigation, acceded to the relief prayed in the petition. The guardian ad litem did not cross-examine witnesses or investigate the suitability of any guardian other than trust companies, and although he found that conflict of interests might arise between the estate of the alleged incompetent and the Hawaiian Trust Company, he recommended its appointment on the ground that it would be more satisfactory than other trustees that would be qualified. (R. 139-140).

A guardian whose interests conflict or may conflict with that of the ward's is not a suitable guardian.

It is respectfully submitted that the appointment of the guardian, under the circumstances shown, is an abuse of

discretion to such an extent that it constitutes a denial of due process to appellants.

It affirmatively appeared on the record that a conflict of interest might arise (R. 140), that the appointment of the Hawaiian Trust Company was opposed by two sisters who by virtue of jointly owned property with Hattie Kulanu Ward had greater interest than the petitioners (R. 137-138), and that the appointment of the trust company would permit petitioners to oust existing management of the family corporation and permit petitioners and those allied with them to secure control.

D. As construed and applied, this section authorizes appointment of a guardian on petition of some relatives without allowing a full and fair hearing to intervening relatives with equal interests and rights in respect to motives of petitioners in seeking appointment of a particular guardian. (Assignment of Error No. 5e.)

Attorney Cass, speaking for appellants, in the hearing on the guardianship petition, sought to question Lani Booth and Edward Hustace, a witness in support of the petition, as to their motives in filing the petition and in seeking to secure the appointment of the Hawaiian Trust Company (R. 125-126; 137-138). Judge Cristy refused to permit questions or a line of questions to elicit this information. (R. 126, 138.)

Judge Cristy ruled:

The court would have to sustain the objection that the motive of the petitioner is not a thing that would disturb the Court or encourage the Court. It is a question of whether or not there is prima facie proof and ultimately a sufficient proof to indicate the state of competency. (R. 126.)

Attorney Cass asked Edward Hustace:

Would you agree to another trust company? (R. 137.) Mr. Anthony objected. The court ruled that Mr. Cass didn't

have any standing to object (R. 137). Mr. Cass stated that the examination of the witness was for the purpose of determining whether or not he and his mother have an outside interest which would be served by the appointment of a specific guardian. The court sustained the objection and refused to permit this line of questioning (R. 137-138).

Motive and interest are clearly material and relevant to proceedings for incompetency.

Thus, in *Justus Francke v. His Wife*, 29 La. Ann. 302, the court said:

In actions for the interdiction of a party for insanity, investigation of the motives of those who are provoking the interdiction are *of the utmost consequence*. The court will guard with peculiar care the alleged lunatic from interference, springing from a hostile motive, and will weigh with more precision the evidence of lunacy, if the person by whom it is tendered appears to be actuated by a sinister intent.

See also *Appeal of John Royston*, 53 Wisc. 612.

It appears affirmatively from the testimony of Lani Booth that she was dissatisfied with the management of her sister's estate by Lucy K. Ward, with whom Hattie Kulamanu Ward had always lived, and in whom she had confidence (R. 125, 129).

Appellants contend that cross-examination as to motive was not only relevant but essential to a proper and fair determination by the court on the issues of competency, and a suitable guardian.

Cross-examination as to motive is always proper on the issue of credibility and interest of a witness. It would seem particularly appropriate in incompetency proceedings to inquire into the motive of petitioner, in order to be satisfied that the end sought is the good of the alleged incompetent and not the selfish gain or advantage of the petitioner. Where, as appears in the record in this case, two sisters initiated and sought the declaration of incompe-

tency and the appointment of the Hawaiian Trust Company, and two sisters opposed the appointment of a guardian, and particularly the appointment of the Hawaiian Trust Company, the motives for the bringing of the petition and for seeking the appointment of a particular guardian should have been subjected to the closest scrutiny.

Instead, Judge Cristy manifested strong partisanship in favor of the petitioners and their choice of guardian, and strong antagonism and challenge to the counsel for the sisters who sought to intervene, impugning their motives and so narrowly limiting the right of cross-examination of their counsel as to make it almost impossible for him to elicit any information for the record.

Judge Cristy could not escape being aware, and indeed showed his awareness, that the impetus for the bringing of the petition was a dispute over the management of the property of the alleged incompetent, the petitioners seeking to change control to a management of their liking.

If there was a conflict of interest between Lucy K. Ward and Kathleen Ward and the interest of Hattie Kulamanu Ward, then there was likewise a conflict of interest with the interest of Hattie Kulamanu Ward and the two petitioning sisters. If the trial court, having determined that it was necessary to appoint a guardian, felt that it was improper to appoint either Lucy K. Ward or Kathleen Ward as guardians, then it was just as improper to appoint a guardian satisfactory to the dissatisfied petitioning sisters and unsatisfactory to the intervening sisters. If there was a conflict of interest, Judge Cristy should have selected either an individual or trust company aligned with neither side, to insure impartiality and fairness to Hattie Kulamanu Ward as well as to all her sisters.

The construction of Section 12509 by the trial judge, sanctioned by the Supreme Court opens the door to gross abuse of the statute in the interest of relatives of an incom-

petent and puts a premium on rushing into court first as a petitioner, in the struggle for control of property. The barbarous concept that only the petitioning relative and not others of equal kinship are entitled to be fully heard can only result in injury to those unfortunates who have property and whom age and insanity overcome.

To require intervenors' counsel to prove Hawaiian Trust Company "a conniver" in the case (R. 137) to have the right to challenge its suitability under the facts and circumstances before the court, when the intervening sisters through their counsel offered to agree to the appointment of any other trust company not so closely allied with the petitioning sisters (R. 137) seems an abuse of discretion of such magnitude as to constitute a denial of due process.

Under the construction of Section 12509 approved by the Supreme Court, those for whose protection Section 12509 was passed have become its prey.

- E. As construed and applied, this section denies fair hearing to intervenors having equal status with petitioners, and gives them no standing to object to the selection of a particular guardian or to propose themselves or another guardian. (Assignment of Error No. 5f.)**

The trial court indicated that Lucy K. Ward and Kathleen Ward, for whom Attorney Cass spoke, had no standing to make any objections to the appointment of Hawaiian Trust Company (R. 137). Mr. Cass asked permission to file with the court a petition for the appointment of Lucy K. Ward as guardian of the person and estate of Hattie Kulamanu Ward, or if the court should rule that her interest was conflicting, for the appointment of Kathleen Ward (R. 141). The circuit judge stated:

The court would not listen to a petition by any of the sisters to be the property guardians because of the fact that they, being sisters with individual interests in the consideration of the property, their interest would naturally be conflicting. (R. 141.)

It has been said that in barbarous times, such was the rule of law, but this rule has been wholly rejected by modern English and American jurisprudence.

In Woerner, *Law of Guardianship*, Section 133, it is stated:

An old English rule discriminated against the heir at law, or the one next entitled to the lunatic's real estate after his death, as custodian of the lunatic's person. This maxim was severely criticized, as not founded on reason, and prevailing only in the barbarous times before the nation was civilized. A similar objection existed, also, though to a far more limited extent, against the next of kin to the lunatic. Both these rules are now disregarded in England as well as in the United States; on the contrary, "the law now supposes that those who stand nearest to the lunatic by the ties of kindred, will treat him with more affection and patient fortitude than strangers in blood."

In *Re Colvin*, 3 Md. Ch. 206, it was held that the power to appoint a committee for an insane person is discretionary with the chancellor, but should not be exercised arbitrarily or capriciously, and without regard to the wishes or recommendations of those interested in the estate, or who feel an interest in the person of the lunatic. The court said:

And accordingly, though it most frequently happens that the committee is appointed on the nomination of the person who sues out the commission of lunacy, a caveat may be entered against the person so nominated, and when this is done, the recommendations of the parties interested will be considered, and proof taken to aid the Court in making a selection. This is the established practice, and the propriety of it is apparent.

See also, *In Re Cooper*, 94 N.Y.S. 270.

In *Re Wood's Guardianship*, (Wash.), 188 P. 787, it was held that the refusal to appoint petitioning wife guardian of community property of herself and husband, he being

incompetent, was an abuse of discretion. It appeared that the property consisted of a ranch worth \$25,000, which the wife had been managing. The court said:

Our statutes relating to guardianship of mentally incompetent persons do not specify who shall be entitled to such guardianship, so we shall assume for present purposes that the question of who shall be guardian in such cases rests in the discretion of the superior court. This discretion, however, must be exercised in the light of the nature of the property to be managed by the guardian, the relationship of the applicant to the incompetent person, and the interest the applicant has, if any, with the incompetent person in the property. Now to appoint a stranger guardian in this case is to appoint a guardian of property in which Mrs. Wood has a right and interest equal with Mr. Wood.

...

Those close to the incompetent by ties of marriage or blood have always been favored by the courts as suitable and proper guardians in such cases. Woerner, American Law of Guardianship §133.

The intermingled interests of appellants with Hattie Kulamanu Ward and their intimate daily association with her give them the strongest claim to consideration by the court.

In the *Matter of Lamoree*, 32 Barb. 122 (N.Y.), it was held that the appointment of a stranger to be committee of the person and estate of a lunatic, without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is not authorized by the practice of the courts. If, on the other hand, it was held, the next of kin unite in a petition and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next of kin have not assented, or united in the petition, there should be an order of refer-

ence, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee.

A petition was filed requesting the appointment of a committee consisting of a nephew and brother-in-law of the alleged lunatic. The court said:

The law in dealing with the persons and estates of that unfortunate class who are bereft of reason and intelligence proceeds upon principles which must commend themselves to the sanction and approbation of every humane and enlightened mind. Considering the close and intimate relations which the committee must maintain with the family and relatives of the lunatic, his power of control—all but absolute—over his person and property, the remote possibility of his ever being in a condition to make any disposition of his estate which shall prevent its descent and transmission to the heirs at law and next of kin, *a rule of practice or of positive legislation which would justify the appointment of a stranger to execute the trust of committee, without the assent and against the will of his family or other relatives, and without any sufficient or adequate cause would be oppressive and intolerable. It would be little less offensive than to deprive a person of his property without cause, and without authority of law.*

.....

In conclusion, we think the order appointing the committee was improvidently granted, and whenever it was brought to the notice of the county court it should have been vacated.

In *Taff v. Hosmer*, 14 Mich. 249, the court held that in the absence of statutory regulations concerning the persons entitled to be heard on applications for the appointment of guardians for a minor, under will or otherwise, resort must be had to the practice in chancery from which probate jurisdiction in guardianship cases is derived; and as the next of kin were entitled by that practice to be heard, they should be allowed to appear in the probate court. The

court held further that any one entitled to be heard on such application must be regarded as entitled to appeal from an adverse decision.

The court said, at page 254:

. . . There can be no doubt that the judge of probate is the ultimate arbiter in the selection, but if no one else has any right to intervene to aid him in making a good and rejecting a bad choice, the condition of a helpless child would be most deplorable. . . .

We do not think that the matter has been left in such an anomalous condition. . . .

It is apparent that if there are not some persons besides the infant who have an absolute right to present their views concerning guardianship, his interests will often be at the mercy of persons by no means calculated to protect him. . . .

We are entirely satisfied that the next of kin may, if they see fit, make themselves parties to guardianship proceedings, and that when they do so, they may appeal from an adverse decision.

It is respectfully submitted that the trial judge committed prejudicial error and abused his discretion in holding that the intervening sisters had no standing to object, and had conflicting interests as a matter of law, and that this error was prejudicial to appellants and deprived them of the full and fair hearing required by law.

F. Section 12509 is wanting in due process because, as construed and applied, it permits the appointment of a guardian without a finding of insanity. (Assignment of Error No. 5g.)

Prior to this case, the Supreme Court of the Territory of Hawaii had held that Section 12509 required a finding that the person is non-compos or insane to such a degree as to be incapable of taking care of himself and his property. *Guardianship of Kawai*, 33 Haw. 643.

In *Rhoads v. Rhoads*, (Ohio), 163 N.E. 724, 726, the court said, in terminating guardianship proceedings:

It certainly cannot be expected that a man advanced in years will retain the same mental powers at 80 that he possessed in his younger years. It occurs to us that that can hardly be expected, and we are quite sure that the law does not contemplate such a condition.

In passing we need but suggest that a person's memory may be impaired, his body may become weak and feeble by reason of age or other infirmities. He may occasionally at times ask questions that may seem out of place, or he may repeat questions and conversations, and may be forgetful at times, yet it cannot be said that such are the constituent elements of and the only test of mentality, and that under such circumstances one is unable to care for his estate and property interests, or that by reason of same he is mentally incapacitated for caring for and preserving an estate of \$7,000.

No finding of insanity was made, nor was any decree entered finding Hattie Kulamanu Ward insane. It has been held that without such finding and decree, the appointment of the guardian is void. Thus, in *Chase v. Hathaway*, 14 Mass. 221, 226, the court said:

We have been surprised of late, to find an irregularity in the probate offices in several of the counties, which we think it is important should be corrected in their future proceedings. It consists in the omission to enter of record orders and decrees, which often have an essential and final effect upon property to a very considerable amount. In the case now before us, it appears that no formal decree was ever passed, declaring the appellant non compos; or, if passed, that the only evidence of it rests in the recital which precedes the letter of guardianship. In a late case in Cumberland, the only evidence of a decree, allowing and approving a last will and testament was of the same nature. This seems to us as irregular as it would be for a common law court to issue execution, without any evidence of a judgment except what might be contained in the execution.

See also *Burke v. McClure*, 245 S.W. 62 (Mo.).

Appellant Lucy K. Ward, as next friend of Hattie Kulamanu Ward, offered to prove, at the hearing on her motion to vacate the appointment of the guardian by testimony of a qualified alienist, that Hattie Kulamanu Ward was competent:

to determine whom she wishes to handle and to represent her in her affairs, although she needs help in the management of her affairs. (R. 153.)

See *Appeal of Hogan*, 194 A. 854; *Allis v. Marton*, 4 Gray (Mass.) 63, 64; *In Re Bryden's Estate*, 61 A. 250 (Pa.); *Denner v. Beyer*, 42 A. (2d) 747 (Pa.); *In Re Gottsman*, 48 A. (2d) 800; *In re Walter's Estate*, 208 P. (2d) 713; *In re Mills*, 27 N.W. (2d) 375; *In re Williams*, 298 N.Y.S. 883.

To uphold the appointment of a guardian without the finding required by the statute, creates a hazardous course for persons of old age, and opens the door for avaricious relatives who are not content to permit their relatives with property to enjoy their property and manage it as they see fit in the declining years of their life. Appellants contend that such a finding is necessary to constitute due process.

IV. THE SUPREME COURT OF THE TERRITORY, IN AFFIRMING THE ORDER VACATING THE APPOINTMENT OF LUCY K. WARD, NEXT FRIEND OF HATTIE KULAMANU WARD, DISSOLVING THE TEMPORARY RESTRAINING ORDER AND DENYING THE MOTION TO SET ASIDE THE ORDER APPOINTING THE GUARDIAN OR TO REMOVE THE GUARDIAN, DENIED APPELLANTS DUE PROCESS OF LAW. (Assignment of Error No. 6.)

The motion and offers of proof made on the return day, of the verified motion of Lucy K. Ward, next friend of Hattie Kulamanu Ward, are summarized in the Statement of the Case, *supra*, page 8 (R. 28-47, 147-148).

On the basis of the allegations of the verified motion and the offers of proof made, the very minimum that equity and justice and due process requires is that the court show neutrality in the family dispute by appointing an impartial person or agency, and not one antagonistic to some of the disputants, and one committed to a course of action acceptable to the remaining disputants, but not to others.

See *Matter of Lamoree*, 32 Barb. 122, 124, *supra*; *In re Rothman*, 188 N.E. 147; *In re Dietz*, 287 N.Y.S. 392; *In re Pflagher*, 62 N.Y.S., 2d 899.

In the words of the New York Court of Appeals in *Matter of Lamoree*, *supra*, it is oppressive and intolerable to force a guardian unsatisfactory to appellants Lucy K. Ward and Kathleen Ward on them, when because of the property jointly owned by them with Hattie Kulamanu Ward, the result is that they cannot do as they see fit with their own property without the consent of a guardian unsatisfactory to and antagonistic to them.

V. THE COURT ERRED IN REFUSING TO CONSIDER ON THE MERITS CERTAIN ASSIGNMENTS OF ERROR ON THE GROUND THAT THEY WERE NOT MADE THE SUBJECT OF EXCEPTIONS, IT BEING SETTLED LAW IN THE TERRITORY THAT IN PROCEEDINGS IN CHAMBERS EXCEPTIONS ARE UNNECESSARY AND THAT ERRORS APPARENT ON THE FACE OF THE RECORD MAY BE CORRECTED BY WRIT OF ERROR REGARDLESS OF THE TAKING OF EXCEPTIONS.

(Assignment of Error No. 7.)

The Supreme Court of the Territory of Hawaii denied appellants due process of law by refusing to consider on the merits the certain questions presented under the writ of error on the ground that they were not made the subject of exceptions at the chambers hearing in probate.

It has never been the practice in the Territory of Hawaii to note exceptions in chambers proceedings, and this seems to be generally accepted practice in most states. 3 C.J.,

Appeal & Error, Section 808 (2). It has been regarded as settled in the Territory that errors apparent on the face of the record may be corrected by writ of error regardless of the taking of exceptions.

Thus, in *Cummings v. Iaukea*, 10 Haw. 1, the Supreme Court of the Territory of Hawaii disposed of the contention that defects apparent on the record on the writ of error must be raised below by demurrer or exception, saying:

The counsel for the plaintiff in error is under the impression that in order to avail himself of a writ of error he must have raised the point in the Court below and perfected his exceptions, if not sustained. This is not the law. 'Any error appearing on the record, either of law or fact, or any cause which might be assigned as error at Common Law,' may be corrected by writ of error. . . .

It was competent for plaintiff in error to have petitioned for his writ, within the statutory time, even though he had demurred, and even if he had not demurred and the record did not state that the demurrer had been argued and decided against him and that he had excepted to the ruling. . . .

In any event, as appears from the transcript of the proceedings, appellants' objections on the points which the Supreme Court refused to consider were through Attorney Cass made known to Judge Cristy during the course of the hearing.

VI. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS CONCLUSION THAT SECTION 12529 DOES NOT AFFORD APPELLANTS, AS A MATTER OF RIGHT, A HEARING ON THE MERITS OF THE MOTION TO REMOVE THE HAWAIIAN TRUST COMPANY, LIMITED, AS GUARDIAN ON THE GROUND OF UNSUITABILITY. (Assignment of Error No. 8.)

Section 12529, Revised Laws of Hawaii, 1945, provides in relevant part:

Where any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, shall become . . . unsuitable therefor, or where it shall appear to any of such judges that it would be for the best interests of the minor¹⁰ to remove the guardian of its person, any of the judges after notice to such guardian and to all others interested, may remove him. . . .

The Supreme Court of the Territory of Hawaii read into and construed Section 12529 in a manner inconsistent with the language of that section. While it may be true that Section 12529 is prospective in operation, appellants, insofar as their motion to remove the guardian is concerned, sought only prospective operation. In their motion, appellants alleged the unsuitability of the trustee on the ground of conflicting interests, which conflicting interests were spelled out in the verified motion. Section 12529, by its terms, does not limit the time at which removal may be sought.

The allegations in the verified motion of conflicting interests clearly make out a case of unsuitability. It is one of the most basic principles of guardianship and trusts that no guardian be appointed whose interests may be conflicting. The inconsistency of the trial court in holding as a matter of law that Lucy K. Ward and Kathleen Ward, most of whose property was owned jointly with the alleged incompetent's, had conflicting interests, while the Hawaiian Trust Company, which engaged in the same kind of business in respect to the management of property as Victoria Ward, Limited, did not have such conflict of interests is apparent.

The allegations of conflicting interests of the guardian, set forth in the verified motion, meet the statutory requirements of 12529, and the Supreme Court, by its construc-

¹⁰ While the word "minor" is used, the section is a part of Chapter 305, which contains Section 12507 and other matters applying to guardians of insane persons as well as minors.

tion of this section, deprived appellants of the right to a hearing given by Section 12529.

VII. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS CONCLUSION THAT THE MANIFEST BIAS AND PREJUDICE SHOWN BY THE CIRCUIT JUDGE AGAINST APPELLANT LUCY K. WARD, NEXT FRIEND OF HATTIE KULAMANU WARD, DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.
(Assignment of Error No. 9.)

The due process clause of the Fifth Amendment to the Constitution of the United States guarantees that all persons in the Territory shall have a full and fair hearing before an impartial and unbiased judge.

In the hearing of the motion to vacate the appointment of the guardian or to remove it, the trial judge manifested strong bias and prejudice against Lucy K. Ward, as next friend of Hattie Kulamanu Ward. At the very outset of the hearing, Judge Cristy stated:

So that the issue at the proceeding of the incompetence of the person Hattie Kulamanu Ward was before the Court on prima facie evidence conceded by the counsel for your client as being sufficient, and not desiring any further evidence on it, the finding then stood, *which by inference indicated that your client over a period of years has acted under a power of attorney, not disclosing the incompetence, which brings the matter in this proceeding a little bit closer home that she is before this Court with unclean hands, assisted by you.* (R. 150.)

Lucy K. Ward filed the motion as next friend of Hattie Kulamanu Ward, and on her behalf. Lucy K. Ward was not on trial. The only statements concerning her or her conduct of her sister's affairs that appear in the record are:

1. The allegation in the petition "That at the present time, due to the incompetence of said Hattie Kulamanu Ward, her business affairs are being conducted by her sister, Lucy K. Ward, as attorney-in-fact and

there is or may be a conflict of interests between Hattie Kulamanu Ward and her attorney-in-fact, Lucy K. Ward.

2. The testimony of the petitioner, Mellie E. Hustace that Lucy Ward had invested some of Kulamanu's money and some of her own money in a ranch on Molokai, and she doubted the wisdom of it, and did not think it was right.

There is no obligation or duty on friends or relatives to file a petition for the adjudication of insanity or appointment of a guardian of a person, even where the insanity may exist without question. Perhaps most frequently, motives of love, humanity and consideration dictate that such petitions are not filed. It was improper, therefore, to accuse Lucy K. Ward of "not disclosing the incompetence of her sister," even if such incompetence existed prior to the filing of the petition. It appears of record that Hattie Kulamanu Ward had been, with the knowledge of petitioners, an officer of the family corporation for many years, and that the petition was filed only after differences arose in the management of the family corporation.

As has been pointed out, no finding was made by the trial court that Hattie Kulamanu Ward was insane, and even if such finding had been made, it would not relate back to a period prior to the entry of such a decree.

Again, Judge Cristy stated:

There is one other factor that is in this record which I want to emphasize and comment upon. There has now been filed an inventory by the guardian showing that in 1947, during the period in which the evidence before this Court at the former hearing, indicated that the sister had been incompetent over a period of years, and Lucy Ward, acting under a power of attorney given years before by such an incompetent person, mortgages large values of stock of her sister to take a joint tenancy in a ranch, a joint tenancy with rights of survivorship; in other words, *feathering her own possible bed in case*

she survives her sister, to get into her hands a property that according to the very note has some \$350,000 or \$400,000 of value, hocked in the Ward's property, a thing which the guardian of the property of Hattie Kulamanu Ward will have to go into as to whether such a deal is a proper deal in the protection of the rights of the ward. And that person, your client, now by a change of counsel purports to start a proceeding as next of friend, and the Court at this time is prepared to vacate that order of appointment of next of friend at this time without any further hearing . . . (R. 176).

The inventory showed no more than that the ward has an interest jointly with Lucy K. Ward in some 13,000 acres of land on Molokai. There was and is nothing in the record justifying a charge of bad faith, fraud, or improper conduct against Lucy K. Ward in the management of the affairs of Hattie Kulamanu Ward, nor anything to bear out the statements of the circuit judge which conclusively show his pre-judgment of the issue without hearing and his bias against Lucy K. Ward.

The appellants offered to prove and stated in her verified petition that the property of Hattie Kulamanu Ward was being properly cared for. The circuit judge, while denying an opportunity to prove this, yet passed judgment without being apprised of the facts.

Counsel for appellant took exception to the remarks of the court as manifesting against Lucy K. Ward such a bias and prejudice as would disqualify him to act, and asked him to permit the matter to be heard by another judge.

At the close of the hearing, after castigating counsel for appellant and denying bias and prejudice, the court stated:

I haven't accused Miss Ward of stealing from her sister. That is your language. (No such language was used by counsel.) I have carefully refrained from any personal aspersions on the character of Miss Lucy Ward, but she has been caught in a situation where the situation speaks for itself. (R. 228.)

Due process is not such a matter of shadow, lacking substance, that if the litigant is taken by surprise by an unexpected antagonism and animosity of the judge, he is helpless. Appellate courts have zealously scanned the record to see that the substance of due process and a full and fair hearing is accorded all litigants by trial judges.

In *Leonard v. Wilcox, et al.*, 101 Vt. 195, the court held that a case of bias and prejudice had been made out. The court said:

When a judge feels and expresses doubt that any evidence, covering matters which have transpired since a former hearing of the same issue, the purport of which he does not know, but which, presumably is material and relevant, will change his conviction then reached, he has admitted his bias, and has disqualified himself from proceeding further in the hearing. A litigant ought not to be compelled to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and his serious doubt that he would do otherwise than adhere to it, no matter what the evidence might be.

In the instant case, at the very outset of the supposed hearing on the verified motion of appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, the trial judge accused Lucy K. Ward of concealing the incompetence of Hattie Kulamanu Ward for a period of years and coming into court with unclean hands, assisted by counsel (R. 150).

Moreover, the trial court completely ignored the fact that Lucy K. Ward was before the court on behalf of Hattie Kulamanu Ward, and not on her own behalf.

On the right to a fair and impartial judge as a requirement of due process, see

N.L.R.B. v. Ford, 114 F. (2d) 905, cert. den. 312 U.S. 689.

Lee v. Fleming, 158 F. (2d) 984.

Rosenberg v. Boun, 153 F. (2d) 10.

United States v. Downes, 142 F. (2d) 477.

Evans v. Superior Court, 107 App. 372.

Tebout's Case, 9 Aff. Prac. 211 (N.Y.).

Warrick v. Moore Co., 291 S.W. 950, 956.

It is respectfully submitted that appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, was denied due process of law by reason of the bias and prejudice of the trial court against her, shown by his injudicious remarks as to her character, unsupported by any factual basis, and that the Supreme Court of the Territory of Hawaii should have remanded the verified motion to the circuit court to be heard before an impartial and unbiased judge.

CONCLUSION

Appellants respectfully submit that the decision of the Supreme Court of the Territory of Hawaii, and the judgment and decree based thereon, should be reversed on the grounds herein set forth.

DATED at Honolulu, T. H., this 23rd day of October, 1951.

Respectfully submitted,

BOUSLOG & SYMONDS

By.....

Harriet Bouslog

Attorneys for Appellants, Lucy K. Ward, Next Friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward.

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUCY K. WARD, Next Friend of Hattie
Kulamanu Ward, and LUCY K. WARD
and KATHLEEN WARD,

Appellants,

vs.

LANI W. BOOTH and MELLIE E.
HUSTACE and HAWAIIAN TRUST
COMPANY, LIMITED, in Its Corpo-
rate Capacity and as Guardian of the
Estate of Hattie Kulamanu Ward,

Appellees.

Appeal from the Supreme Court of the
Territory of Hawaii

APPELLANTS' REPLY BRIEF

FILED

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APPELLANTS' REPLY BRIEF

JURISDICTION

Under Section 1293 of Title 28 of the U. S. Code, this Court has jurisdiction to hear appeals from the Supreme Court of the Territory of Hawaii in all cases involving the Constitution, laws or treaties of the United States, or any authority exercised thereunder. In addition, it has complete appellate authority in all other civil cases where the value in controversy exceeds \$5,000.00.

It is appellants' contention that this record shows abuses of discretion and erroneous statutory constructions of such magnitude that they amount to a denial to appellants of

due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. It is likewise asserted that there has been a denial of a jury trial guaranteed by the Seventh Amendment to the Constitution.

If, however, this Court does not agree, this Court has power to correct manifest errors of law and abuses of discretion even though no infringement of constitutional rights is shown.

This case involves more than an appeal from a decree of the Supreme Court appointing a guardian of the estate of an alleged incompetent, as appellees assert. It likewise involves an appeal from a decision of the circuit court at chambers, affirmed by the Supreme Court, denying without hearing on the merits a motion to vacate the order appointing the guardian and for the removal of the appointed guardian. Serious questions of fact were put in issue by the denial by the appellees of the facts alleged in the verified motion to vacate the appointment of the guardian, or to remove the guardian (R. 31-47), but the motion was summarily dismissed.

COMMENTS ON APPELLEES' STATEMENT OF THE CASE

Appellees' statement of the facts are distorted by omission.

The petition for the appointment of a guardian of Hattie Kulamanu Ward alleged, as is required by the statute of the Territory of Hawaii, that Hattie Kulamanu Ward was *non compos*, and that as a result thereof, she was incompetent to care for her property. A person must, under Sections 12508 and 12509, Revised Laws of Hawaii, 1945, be *non compos* before a guardian can be appointed. (These sections are set forth in Appellants' Opening Brief, page 16, and Appellees' Reply Brief, Appendix, pages ii and iii.)

The only indication that notice was served upon Hattie Kulamanu Ward—who never appeared in the proceedings—

is the sheriff's return (R. 25). No finding of notice was made by the probate judge. Without the appearance of Hattie Kulamanu Ward or any showing of the reason for her non-appearance, the probate judge appointed a guardian *ad litem* for her although she was then, under the law of the Territory, presumed to be sane.

On December 28, 1948, at the request of the guardian *ad litem*, the matter was continued for hearing until January 20, 1949 (R. 116-117). Without any explanation appearing therefor in the record, the hearing on the petition was advanced and held on January 13, 1949. Lucy K. Ward, as a sister and intervenor, appeared by Wendell Carlsmith, Esq., of Carlsmith and Carlsmith, at the hearing on January 13, 1949, and Kathleen Ward, as a sister and intervenor, appeared by Attorney Cass (R. 117-118). During the course of the hearing, however, after Attorney Carlsmith stated he had no objections to the appointment of the Hawaiian Trust Company, Limited, Attorney Cass undertook to speak for both Lucy K. Ward and Kathleen Ward, as sisters and intervenors (R. 137) and to oppose the appointment of the appellee Trust Company as guardian. Lucy K. Ward, however, appears here not only on behalf of herself but also as next friend of her sister Hattie Kulamanu Ward. Appellees choose to ignore the legal distinction between these two capacities.

In the motion to vacate the appointment of the guardian or for rehearing and removal of the guardian, an offer of proof was made by Lucy K. Ward that her attorney had disobeyed her instructions at the hearing held on the petition on January 13, 1949 (R. 160). This fact is ignored by appellees as well as by the courts below.

It is questionable as a matter of law, as appellees assert, whether the testimony of Mrs. Booth, as it was given before Judge Cristy in the hearing on the guardianship proceeding (R. 119-130) or as it is summarized in appellees' brief,

page 3, establishes that Hattie Kulamanu Ward was *non compos*. It is doubtful if Dr. Kepner's report establishes that Hattie Kulamanu Ward was *non compos*. The court made no finding, as required by Section 12509, that Hattie Kulamanu Ward was insane (R. 131-132).

Even if the conduct of counsel for Lucy K. Ward or Kathleen Ward constituted a waiver on their behalf of further evidence on the issue of competency, such waiver does not affect the right of the alleged incompetent, Hattie Kulamanu Ward, who here appears by Lucy K. Ward, her next friend, or constitute a waiver on her part.

Appellees foreshorten the testimony in reporting that the guardian *ad litem*, after investigation, believed the Hawaiian Trust Company, Limited was best qualified to serve as guardian by omitting the following admission:

The Court: Did you ascertain as to whether or not there were any conflicting interests in the Hawaiian Trust Company?

Mr. Collins: I did, your Honor, and the result of my investigation was that conflicting interests would arise principally because of the fact that the property owned by the corporation would be property that might be leased to interests which the Hawaiian Trust Company might otherwise represent. But, as far as I can ascertain, that is the sole conflicting reason that appears. That factor was balanced against the other factors on other trust companies, and it was felt that even with that element present that they would be a satisfactory trustee. It would be more satisfactory than other trustees that would be qualified. (R. 140)

The probate judge's conclusion that the interests of the sisters of Hattie Kulamanu Ward, Lucy K. Ward and Kathleen Ward would naturally be conflicting is not based upon any fact or circumstance appearing in the record. If the probate judge had been fully advised of the facts, he would have known that the largest proportion of the ward's estate

was owned jointly with the sisters, Lucy K. Ward and Kathleen Ward, so that their interests, to that extent, were identical.

The probate judge illogically appointed, over the opposition of these two sisters with joint interests, a trust company known to him to be unsatisfactory to them and nominated by sisters with no joint interests with the alleged incompetent.

The motion of Lucy K. Ward, next friend of Hattie Kulamanu Ward, to vacate the order appointing the guardian or for rehearing and to remove the guardian is set forth in the record at pages 31 through 47.

A denial of the verified allegations of this motion was made in the return to the order to show cause by appellees. Thus issues of fact for determination were framed, but left unresolved by the probate judge's refusal to hear the evidence offered by appellants.

The *ex parte* order appointing Lucy K. Ward next friend of Hattie Kulamanu Ward, and the temporary restraining order, were applied for and a showing made to the court of a necessity of an *ex parte* order in accordance with territorial law. The matter was presented to Judge Moore in the absence of Judge Cristy and was made returnable before Judge Cristy on March 16, 1949 (R. 48-49).

On the return day of Lucy K. Ward's motion as next friend of Hattie Kulamanu Ward, an offer of proof was made of evidence showing that Hattie Kulamanu Ward had been examined by a competent alienist other than the alienist whom the guardian *ad litem* had employed, and that this alienist had reached the conclusion that Hattie Kulamanu Ward was competent to determine whom she wished to handle and to represent her in the management of her affairs, although she needed help in the management of her affairs (R. 153).

Where evidence of this kind has been produced many

courts have refused to appoint a guardian. See, for example, *Appeal of John Royston*, 53 Wisc. 612, 624; *In Re Bryden's Estate*, (Pa.) 61 A. 250; *Denner v. Beyer*, (Pa.) 42 A. 2d 747; *In Re Gottsman*, 48 A. 2d 800; *In Re Wiesenbergl*, 3 N.Y.S. 2d 745; and *In Re Walter's Estate*, 208 P. 2d 713.

Under the Hawaiian statute and under general construction of similar statutes in other jurisdictions, the offer of proof was sufficient to require the probate judge to reopen the hearings on the issue of competency if justice were to be done to Hattie Kulamanu Ward.

The verified motion alleged that a full and complete hearing to determine the degree of competency of Hattie Kulamanu Ward and the necessity and desirability of appointing a guardian for her had not been had and asked the court to reopen the hearing for the taking of further testimony on the issue of competency. The verified motion was supplemented by the specific offers of proof made at the hearing to show Hattie Kulamanu Ward competent to manage her property with the assistance of agents selected by her, and competent to select suitable agents (R. 44-45).

Appellees abstract portions of statements of counsel before Judge Cristy which, when wrested from context, say the opposite of the portion quoted. Thus, while counsel stated, as indicated by appellees, at page 7 of their brief:

I cannot say to your Honor that we will adduce testimony which shows whether or not there was any necessity for the appointment of a guardian * * * (R. 159),

this statement was immediately followed by the following text:

I can say we will offer to this Court testimony of an expert witness who has examined Hattie Kulamanu Ward and who has prepared a report here, who can be brought here in person. It is not for counsel; it is not for Lucy K. Ward to determine the degree of the

competency of Hattie Kulamanu Ward. It is for the Court after hearing evidence, to determine—

While counsel was interrupted by the probate judge before being permitted to complete the sentence, the full paragraph as stated is an unexceptional statement of law that the court is to determine, under Hawaiian law, whether an alleged incompetent is *non compos* after hearing the evidence, and that the judgment of a person being *non compos* is a legal judgment to be entered by the court based on evidence and not assertions of legal conclusions by counsel.

The mere conclusion of the psychiatrist employed by the guardian *ad litem* seems scant evidence on which to justify the probate judge depriving Hattie Kulamanu Ward of the right to control her property, and to select agents of her own choice.

With respect to the showing of the conflict of interests between the Hawaiian Trust Company and Victoria Ward, Limited, in which Hattie Kulamanu Ward owned substantial shares of stock, on the return day of the hearing on the order to show cause, counsel, rather than stating a conclusion of law to the court as to whether there were adverse interests in the very nature of the business of the Hawaiian Trust Company and Victoria Ward, Limited, quoted the purposes as set forth in the articles of association of Victoria Ward, Limited (R. 167-169). Judge Cristy, the Supreme Court of the Territory, and this Court can take judicial notice that the purposes of Victoria Ward, Limited, as shown by the articles of association, are to a large extent identical with the business and powers of a trust company under Section 8655, Revised Laws of Hawaii, 1945. While Victoria Ward, Limited, was not organized *per se* as a trust company, in many respects—in fact most respects—it engaged in dealing with real property and securities which trust companies under the law of Hawaii, likewise engage in.

In the motion to vacate the appointment of the Hawaiian Trust Company, for rehearing, or to remove the guardian, specific conflicts of interest, as well as general conflicts of interest between the Hawaiian Trust Company, Limited and Victoria Ward, Limited, in which the alleged incompetent owned approximately 23% of the capital stock, are alleged (R. 38-41).

While the appointment of an officer of the Hawaiian Trust Company as a member of the board of directors of Victoria Ward, Limited might be legally appropriate in event there were no conflicting interests, it would not be legally proper if there were a conflict of interest between the two companies either under the law of guardianship or the law of fiduciary and corporate relations.

The Molokai ranch transaction occurred in 1947, fully a year and a half before the family disputes arose which resulted in the filing of the guardianship petition by appellees. The probate judge passed judgment on the transaction without any facts whatsoever on which to base that judgment.

While it is true that the constitutionality of Section 12509 was not assigned as error in the writ of error proceeding, it was raised and ruled on by the Supreme Court, and that decision, though erroneous, will stand unless reversed by this Court.

The Supreme Court's holding that Section 12529 contemplates removal of a guardian only for grounds which arise after the appointment of a guardian constitutes a revision of the statute by the Court. The statute on its face fixes no time limit within which to raise questions concerning the suitability of a guardian, although naturally a suit for removal could not arise until after appointment.

It is not generally accepted practice to set forth in verified motions or petitions all elements of evidence intended to be introduced in support of the allegations contained there-

in. The probate judge was not fully advised of the facts because no opportunity was afforded to support the allegations of the verified motion by evidence.

The Supreme Court's sanctioning of the attack upon Lucy K. Ward by Judge Cristy without any facts before him warranting such an attack seems an abandonment by the Supreme Court of its duty to search the record to determine whether applicants are given a fair hearing before a fair tribunal.

**PRELIMINARY STATEMENT OF HAWAIIAN DECISIONS
CONSTRUING SECTION 12509, REVISED LAWS OF HA-
WAIL, PRIOR TO THE DECISION IN THE INSTANT
CASE.**

Section 12509, Revised Laws of Hawaii, has been infrequently before the Supreme Court of the Territory for construction.

In *Re Estate of William Brash*, 15 Haw. 372, the Supreme Court of Hawaii held that an adjudication that a person is of unsound mind and unable to take care of his property is null and void where no notice of the proceedings or opportunity to be heard is given to the supposed insane person, even if the person declared insane was actually in court at the time the guardian was appointed in connection with other matters.

In *Kalaniana'ole v. Liliuokalani*, 23 Haw. 457, an action was instituted for Liliuokalani by next friend on the ground of a weakness of mind of Liliuokalani. Liliuokalani appeared and controverted the right or authority of her next friend, and denied that she was of weak mind necessitating the prosecution of the action by next friend. The court held Liliuokalani was entitled to a judicial determination of her competency before the action could proceed.

To the same effect, see *Nawahie v. Kamalani*, 24 Haw. 85. In the latter case, the court further held that a judicial hear-

ing and the taking of evidence is required to establish mental incompetency, and that the taking of evidence of one witness followed by refusal on the part of the court to hear any other or further evidence falls short of a judicial inquiry. The court said:

It therefore follows that there is but one question presented for our consideration by the record in this case, to wit, was a fair judicial inquiry upon the issues had when but a sole witness (the alleged incompetent) was permitted to testify; or did the trial judge abuse his discretionary power in peremptorily terminating the inquiry upon the conclusion of the evidence of this witness and by refusing to hear any other evidence and by dismissing the suit? Counsel for respondent appears from the record herein to have been prepared and anxious to present other evidence, but was denied the right to so do by the ruling of the trial judge, following which the judge ordered a dismissal of the suit. This action of the judge is the burden of appellant's grievance for which she now seeks the interposition of this court.

A judicial inquiry contemplates an adjudication of the adverse claims. It corresponds to a judicial hearing and implies a judicial examination of the issues between the parties, whether of law or of fact; the receiving of facts and arguments and the right to adduce testimony. See 21 Cyc. 408. A trial judge may in any proceeding properly refuse to hear cumulative evidence upon a question already fully established, but it is our opinion that no court has a right in relation thereto, to deny the party having the affirmative of the issue the right to present any other or further evidence thereon. Such a procedure, in our opinion, falls far short of a judicial inquiry as contemplated by the law.

In *Re Pires*, 28 Haw. 269, the Supreme Court of Hawaii held that it was not necessary to the jurisdiction of the circuit court to appoint a guardian of an insane person that he be violent or dangerous to the safety of the community;

that it is sufficient if it appears that mental unsoundness exists to such a degree as to render it necessary that a guardian be appointed for the protection of the person or estate of the alleged insane person. The evidence in this case showed that the alleged incompetent suffered from periodic mental distractions of extended duration which rendered her for the time being incapable of caring for her person or property.

Guardianship of Kawai, 33 Haw. 643, closely parallels this case, since the only testimony before the court was the testimony of petitioner Lani Booth and Edward Hustace, and the record shows only the conclusion of the alienist on which the court, without making any finding of insanity, relied in holding Hattie Kulamanu Ward incompetent to manage her property. The Supreme Court in the *Kawai* case held that *non compos*, as that term is employed in Section 4858, Revised Laws of Hawaii, 1935, which is substantially the same as the present section 12509, is a person of such unsoundness of mind as to be incapable of taking care of himself and his property. The court said:

It is obvious from a reading of the statute that contrary to the statement contained in the decree it does not define the term "non-compos" and the generic significance of that term is left unimpaired further than it may be qualified by its association with other named types of persons of unsound mind which the statute declares the words "insane person" are intended to include and is to be so construed in all provisions of statutory law relating to guardianship and wards.

Etymologically a "non-compos" person is the logical antithesis of a "compos" person or person of sound mind. In a legal and general sense used in connection with the statutory grant of jurisdiction to appoint guardians of the person and estate of insane persons the term *non-compos* may be considered as a person of such unsoundness of mind as to be incapacitated thereby from taking care of his property. *In the Matter*

of *Barker*, 2 Johns. Ch. (N.Y.) 232. R. L. H. 1935, § 4859, however, expressly requires that before a guardian be appointed for an insane person it affirmatively appear that the person in question is incapable of taking care of himself. So that it may be said that the term *non-compos* as employed in section 4858 is a person of such unsoundness of mind as to be incapable of taking care of himself and his property.

See also *Guardianship of Pratt*, 34 Haw. 935, discussed hereinafter.

One of the appellees, Lani Booth, since this appeal was docketed in this Court, filed, in the same guardianship proceedings, with the same file number, a "Petition for Appointment of Guardian of the Person" of Hattie Kulanu Ward. The petition after hearing was dismissed by the probate judge. A copy of the decision is set forth as Appendix I of this brief.

I. APPELLANTS' REPLY TO ARGUMENT UNDER POINT I OF APPELLEES' ANSWERING BRIEF (pp. 13 through 19). PROCEEDINGS TO ADJUDICATE INSANITY, IN HAWAII, ARE SUITS AT COMMON LAW IN WHICH, UNDER THE FIFTH AND SEVENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, A TRIAL BY JURY IS GUARANTEED.

In respect to the appellees' assertion under this point of its brief that this issue was raised for the first time before the Supreme Court, it is pointed out that it has long been the law in Hawaii, as generally, that jurisdictional questions may be raised at any time and may be raised for the first time on appeal. Thus, in *Territory v. Correa*, 24 Haw. 165, the Supreme Court of the Territory stated:

The objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceeding and may be raised for the first time on appeal. It may, as a matter of fact, be raised by the court on its own motion. (citing authorities.)

See also 14 *Am. Jur.*, Courts, Section 191, citing *Territory v. Coney* and other cases.

Probate courts are almost universally held to be courts of limited jurisdiction and cannot administer remedies except as provided by statute.

14 *Am. Jur.*, Courts, Section 8.

If the statute under which such a court purports to act is unconstitutional, the court has no jurisdiction. The power of the probate court to appoint guardians under Section 12509 is purely statutory, and if the statute is unconstitutional the court has no power to proceed under it.

The truncated quotation of appellees of *Montana Co. v. St. Louis Mining Co.*, 152 U.S. 160, 38 L. ed. 398, is misleading. That case involved the question of whether a section of the Montana code of civil procedure authorizing a court or judge of the state of Montana to order an inspection, examination or survey of a lode or mining claim was repugnant to the Fourteenth Amendment of the United States Constitution. The passage quoted merely holds that due process of law under the Fourteenth Amendment in respect to state proceedings does not require a jury trial.

Appellants do not urge that the due process clause of the Fourteenth Amendment is applicable to the Territory of Hawaii or that the due process clause of the Fifth Amendment standing alone requires a jury trial in lunacy proceedings. Appellants urge that the due process clause of the Fifth Amendment, read in conjunction with the Seventh Amendment, interpreted in the light of the common law existing at the time of the adoption of the Bill of Rights, guarantees a right to a jury trial in lunacy proceedings in federal and territorial courts. As was pointed out in appellants' opening brief, the Seventh Amendment does not apply to state court proceedings. It applies only to proceedings in the federal court and to territories to which, like

Hawaii, the Constitution and the Bill of Rights have been extended.

Some state courts have reached the conclusion, under their constitutions, that the provision that the right to jury trial shall remain inviolate guarantees the right to a jury trial in insanity proceedings. See exhaustive discussion of authorities on this point in appellants' opening brief.

Other states, because of the law in force at the time of the adoption of the state constitution, have reached a contrary conclusion. Wisconsin is one of the states which reached a contrary conclusion. The statement in the Montana case holds no more than this and cites a Wisconsin case so holding.

The appellees urge that a lunacy proceeding is not a suit at common law within the Seventh Amendment. Primarily, this contention appears to be based on the fact that a lunacy proceeding is not primarily legal in its nature.

Appellees rely upon the language in *Parsons v. Bedford*, 3 Peters 433, 7 L. ed. 732. Appellants likewise called the court's attention to *Parsons v. Bedford* in their opening brief, and pointed out the discussion therein which calls attention to the fact that the best contemporaneous construction of the Seventh Amendment by Congress was contained in the Judiciary Act of 1789, which was contemporaneous with the proposal of the Seventh Amendment. The ninth section of that act provided:

The trial of issues of fact in the district courts in all causes except civil causes of admiralty or maritime jurisdiction, shall be by jury.

Clearly the question of lunacy is a question of fact and does not arise in either admiralty or maritime jurisdiction.

Appellees assert that no case has been cited to this Court holding that an insanity proceeding is an action at law. The cases cited by appellants, however, show clearly that under the English common law, the Chancery Court had

no jurisdiction over the estate or person of a lunatic until after a jury had found him to be *non compos*. The language of the Seventh Amendment is not "action at law" but rather "suits at common law."

The leading Maryland case, *Hamilton v. Traber*, 27 A. 229, 230-232, cited by appellants at page 23 of their opening brief, relates this history of the writ of *de lunatico inquirendo*:

Lunacy or mental unsoundness did not give the English court of chancery jurisdiction over the person or estate of a lunatic until after an inquisition of a jury adjudging the person to be a *non compos mentis* had been first regularly found. The authority directing the inquisition to be taken did not pertain to that court, but was derived by delegation from the crown. It was a portion of the king's executive power, as *parens patriae*, and did not belong to the court of chancery by virtue of its inherent and general judicial functions. This branch of the regal authority was delegated to the crown, by means of an official instrument called the "Sign Manual," signed by the king's own signature, and sealed with his own privy seal, and was exercised by the chancellor alone, and not by the court of chancery. 3 Pom. Eq. Jur. §1311; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; *Oxenden v. Lord Compton*, 2 Ves. Jr. 69; *Lysaght v. Royse*, 2 Schoales & L. 151; *In re Fitzgerald*, Id. 432. Anciently, in point of fact, the custody of the persons and property of idiots and lunatics, or at least of those who held lands, was not in the crown, but in the lord of the fee. The statute *de prerogativa regis*, the seventh of Edw. II, c. 9, gave to the king the custody of idiots, and also vested in him the profits of the idiot's lands during his life. By this means the crown acquired a beneficial interest in the lands, and, as a special warrant from the crown is in all cases necessary to any grant of its interest, the separate commission which gave the lord chancellor jurisdiction over the persons and property of idiots may be referred to this consideration. With respect to

lunatics, the statute of 17 Edw. II, c. 10, enacted that the king should provide that their lands and tenements should be kept without waste. It conferred merely a power, which could not be considered as included within the general jurisdiction antecedently conferred on the court of chancery, and therefore a separate and special commission became necessary for the delegation of this new power. Story, Eq. Jur. §1335. The existence of this vested interest in the crown is the reason that mere lunacy did not originate the jurisdiction of the court of chancery over the persons and estates of idiots and lunatics, but the lunacy had first to be inquired of by a jury, and found of record, in accordance with the rule of law, wherever a right of entry is alleged in the crown. After this special jurisdiction conferred by the "Sign Manual" had been exercised in any particular case by adjudging an individual to be a lunatic, and by appointing a committee of his person and property, a further jurisdiction then arose in the court of chancery to supervise and control the official conduct of the committee. 3 Pom. Eq. Jur. §1311; *Ex parte Grimstone*, Amb. 707.

In *In re Bristor's Estate*, (Md.) 81 Atl. 25, 28, the court said:

It is to be observed that the Code, while conferring upon courts of equity general jurisdiction with respect to persons non compos mentis, does not prescribe the method by which the incapacity shall be ascertained. The course of procedure leading up to an adjudication of mental unsoundness remains as it existed, independently of statute, under the English practice, whose origin and theory are fully and clearly discussed in *Hamilton v. Traber*, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258.

There is not complete unanimity of the legal authorities on the question of the history of the writ *de lunatico inquirendo*. As even appellees concede, however, the pro-

cedure in most colonies at the time of the revolution, in respect to insanity proceedings, included a jury.

Cooley's *Blackstone*, 4th Ed., Vol. 1, page 261, says:

By the old common law there is a writ *de idota inquirendo* (of inquiring concerning an idiot) to inquire whether a man be an idiot or not, which must be tried by a jury of twelve men.

The same author, at page 263, says:

The method of proving a person non compos is very similar to that of proving him an idiot.

The same attitude is expressed by Buswell on Insanity, page 35, and in Pomeroy's Equity Jurisprudence, §1312.

As appellants read these authorities, they hold that the common law method of declaring a person an idiot or a lunatic was by a common law jury.

The statutory law of the District of Columbia is at variance with cases arising in the District cited in appellants' opening brief, page 20. The validity of these statutes, as well as the statutes of territories, so far as appellants have been able to discover, has never been squarely determined by the United States Supreme Court.

Since the decision of the Supreme Court of the Territory of Hawaii in *In Re Atcherley*, 19 Haw. 346, in 1909, it has been settled law in the Territory that an alleged incompetent is not entitled to a jury trial on the question of whether he is of sound mind. Section 9648, Revised Laws of Hawaii, 1945, subdivision 6, cited by appellants, which authorizes the judges of the several circuit courts at chambers to select and impanel a special jury of inquiry and then to act upon the verdict of the jury as equity and good conscience require, does not meet the constitutional requirements to a jury trial given by the Seventh Amendment to the Constitution.

Hattie Kulamanu Ward never appeared in the proceedings to declare her incompetent, except by the guardian *ad litem* appointed for her by the court, and by Lucy K. Ward, next friend, who specifically urged this question before the Supreme Court.

If the Fifth and Seventh Amendments to the Constitution of the United States guarantee, as appellants urge, the absolute right to a jury trial in lunacy proceedings, the provisions of Section 9648, subdivision 6, of Revised Laws of Hawaii, 1945, do not satisfy that constitutional guarantee, particularly in the light of the decision of the Supreme Court of the Territory in *In Re Atcherley*, *supra*.

As is pointed out in appellants' opening brief, there also seems to be considerable doubt as to whether in lunacy proceedings there can be an effective waiver of a jury trial. If there is, as appellants urge, a constitutional right to a jury trial in insanity proceedings under the Fifth and Seventh Amendments, the doubtful right under Hawaiian law to ask for the impanelling of an advisory jury does not satisfy that legal right, for if such right exists, it is absolute and the decision of the jury is binding on the court to the same extent that other jury verdicts are binding.

II TO IV. APPELLANTS' REPLY TO ARGUMENT UNDER POINTS II TO IV OF APPELLEES' ANSWERING BRIEF (pp. 19 through 27).

ABUSE OF DISCRETION AND ERRONEOUS STATUTORY CONSTRUCTION AMOUNTING TO A DENIAL OF DUE PROCESS OF LAW APPEAR IN THE RECORD IN THIS CASE. ALTERNATIVELY, MANIFEST ERROR REQUIRING REVERSAL OF THE SUPREME COURT OF THE TERRITORY BY THIS COURT APPEARS.

Appellants' points III, IV, V and VI in their opening brief, pages 29 to 46, discuss fully the points covered in appellees' answering brief, points II to IV.

A. ABUSE OF DISCRETION AMOUNTING TO A DENIAL OF DUE PROCESS OF LAW, OR, ALTERNATIVELY, MANIFEST ERROR IS APPARENT ON THE RECORD, REQUIRING REVERSAL BY THIS COURT.

It is appellants' contention that there is either an abuse of discretion amounting to a denial of due process of law, or, in the alternative, manifest error which entitles appellants to a reversal of the decree on appeal and judgment on writ of error of the Supreme Court of the Territory. Appellants base this contention on the following facts appearing of record:

The record of the hearing on the petition for the appointment of a guardian of Hattie Kulamanu Ward discloses that Hattie Kulamanu Ward, who appears in this appeal by Lucy K. Ward, her next friend, has four sisters: Lani W. Booth and Mellie E. Hustace, appellees, and Lucy K. Ward and Kathleen Ward, appellants.

Lani W. Booth and Mellie E. Hustace, appellees, petitioned for an adjudication that Hattie Kulamanu Ward was insane and sought the appointment of Hawaiian Trust Company as her guardian. Lucy K. Ward and Kathleen Ward, appellants, objected to the proceedings through counsel, or, in the alternative, asked that one or either of them be appointed guardian, or, as an alternative to that, that any trust company other than the Hawaiian Trust Company sought by appellees be appointed.

With these facts before him, the probate judge ruled that appellants, Lucy K. Ward and Kathleen Ward, had no standing to object and had conflicting interests as a matter of law. The only result of this decision can be to place a premium on rushing into court first to seek an adjudication of incompetency of a relative under the provisions of Section 12509, Revised Laws of Hawaii, 1945.

It also appears of record that Hattie Kulamanu Ward has lived all her life with appellants, Lucy K. Ward and Kathleen Ward, and that she was in good hands and that there

was no necessity, in her condition or otherwise, for the appointment of a guardian of her person or any change in respect to the circumstances of her life personally.

The only logical inference from these facts is that the two appellants, Lucy K. Ward and Kathleen Ward, were closest to Hattie Kulamanu Ward, by ties of relationship and life-long association. Appellants were the natural guardians of Hattie Kulamanu Ward; and if a legal guardian was appointed, they were certainly entitled to be considered for appointment on the basis of facts and evidence, rather than a legal conclusion unsupported by authorities and announced by the probate judge solely for the purposes of this case. Appellants, as appears by the record, were the persons in whom Hattie Kulamanu Ward had in fact relied all her life, and in whom she had placed her trust and confidence.

There was no showing of any kind of any conflict of interest between appellants Lucy K. Ward, Kathleen Ward and Hattie Kulamanu Ward. There is a mere suggestion or inference from the testimony of appellee Lani Booth against Lucy K. Ward, in that Mrs. Booth testified that Lucy K. Ward had purchased a ranch in part with Hattie Kulamanu Ward's funds, which Mrs. Booth did not consider a good investment (R. 125).

Mrs. Booth, in her testimony at the hearing on the petition, made no such charge of fraud as the probate judge and counsel for the guardian made at the return day on the motion, nor did she make any assertion that the joint tenancy of Lucy K. Ward and Hattie Kulamanu Ward in the ranch was improper. The purchase of the ranch, as appears by the record, took place at least a year and a half before the proceedings were instituted.

In respect to Victoria Kathleen Ward, there was not even a suggestion or inference of any kind of a conflict of interest, nor of her unfitness to serve.

There appears on the record of the hearing on the petition for the appointment of the guardian alone, appellants believe, an abuse of discretion of such magnitude as to constitute denial of due process of law, or in the alternative, manifest error requiring reversal.

The Supreme Court of Wisconsin, confronted with a somewhat analogous situation to that which exists here, said, in *Appeal of John Royston*, 53 Wisc. 612, at page 624:

We are, however, inclined to think that under the statute the county court should not proceed to the appointment of a guardian under the statute, when there are near relatives of the person, with whom he resides, or who have the care of him, on the application of a friend, unless it appears from the petition that there is some good reason why the application is not made by such relatives. The statute, we think, contemplates that the relatives shall make the application, when there are any in the immediate vicinity of the insane or incompetent person; and this should be so, especially when the court proceeds to appoint a guardian of the person of one insane or incompetent. The custody of a father, or grandfather, should not be taken from a son, or daughter, or grandchild, or other near relative, on the application of one not being a relative, unless there be some other reason shown than that his physical and mental powers have become enfeebled by age, and certainly not upon the application of a person who makes the application because of some ill-will or misunderstanding between himself and the person who has the management of his estate. See *Francke v. His Wife*, 29 La. Ann., 302, 309.

This was the state of the record at the time the motion of Lucy K. Ward, next friend of Hattie Kulamanu Ward, for rehearing and for revocation of the order of appointment of the guardian, or for the removal of the guardian on the ground of unsuitability, came on for hearing. This verified motion brought to the attention of the probate

judge facts which clearly were not known to the probate judge at the time of the selection of the guardian, concerning the nature of Hattie Kulamanu Ward's estate, the motives of the appellee sisters who petitioned for the appointment of the Hawaiian Trust Company, the unsuitability and conflicting and antagonistic interests of the appointed guardian, the stock situation in respect to the family corporation—which showed that the appointment of the Hawaiian Trust Company would in effect change the management and control of the family corporation—and many other matters relevant and essential for the probate judge to know before an equitable determination could be made as to the proper guardian to be appointed, if a guardian was necessary.

It is apparent from the record that none of these most important facts were made known to the probate judge by the appellees or brought to his attention by the guardian *ad litem*.

But even more important, from the standpoint of equity and good conscience, were the allegations that the next friend of the alleged incompetent had obtained and desired to place before the court further evidence on the issue of competency.

When the grave nature of proceedings to declare a person *non compos mentis*, and to take from him his right of personal liberty and his right to control his property, is considered, the duty of a court of equity to inform itself of all facts is inescapable. The potentiality of abuse of the statute and the danger that it may, if not administered with the utmost caution, be used as a vehicle for bringing about the very purpose it was designed to prevent, has been strongly and frequently emphasized by courts.

In *In Re Bryden's Estate*, (Pa.) 61 A. 250, where it appeared that five of seven children of the alleged incom-

petent sought an appointment of a guardian, the court dismissed the petition, saying:

Before an estate can be taken from the owner and transferred to a guardian, it must be established that the respondent is so weak in mind that he is unable to take care of his property, and in consequence thereof is liable to dissipate or lose the same and to become the victim of designing persons. The act is for the respondent and is not intended to prevent the owner of an estate from doing with his own what he pleases in order that his children may inherit a greater amount. . . . Applications of this nature are not to be encouraged and should not be granted except in a clear case. As is declared in *Hoffman's Estate*, 209 Pa., 58 A. 666, it is a dangerous statute easily capable of abuse by designing relatives to accomplish the very wrong intended to be guarded against, and therefore to be administered by the courts with the utmost caution and conservatism. It is the policy of the law to allow an owner to manage his own estate, and it can be taken from him only for his own personal good, and not because his children think they, or someone of them, can manage it to better advantage.

. . . . All that can reasonably be expected of a woman seventy-six years old, in the management of her estate is the selection of a competent and trustworthy agent and this she has done. The court could do no more.

In *Denner v. Beyer*, (Pa.) 42 A. 2d 747, the Supreme Court of Pennsylvania reversed an order appointing a guardian and strongly cautioned that the statute providing for the appointment of guardians must be administered with utmost caution because of the seriousness of the deprivation of rights, if justice is to be done.

It has been frequently held that an application for an adjudication of insanity and the appointment of a guardian is addressed to the sound discretion of the court, and does not issue as a matter of right. See *In Re Gottsman*, 48

A. 2d 800, reversing the order appointing a guardian for an 89-year old man on the petition of some of his children.

The court in *In Re Wiesenbergh*, 3 N.Y.S. 2d 745, reversed the lower court's action in appointing a guardian, saying that the application should have been denied for the reason that the incompetent is receiving all the care and her property all the protection which circumstances require.

See also *In Re Walter's Estate*, 208 P. 2d 713.

The high degree of proof and the urgent reasons necessary to support so serious a deprivation of liberty and property has been frequently commented on by courts.

Greenwade v. Greenwade, 43 Md. 313.

Re Streiff, 119 Wis. 566.

In re Mills, 27 N.W. 2d 375.

In the *Mills* case, the court rejected as proof of incompetency the fact that an 80-year old had executed a power of attorney, pointing out that a power of attorney could be revoked at any time, and that the attorney is liable for any misconduct.

Abuse of discretion in the appointment of guardians or in the failure to appoint nominees of persons closest to the alleged incompetent were found in the following cases, which, on the facts, are closely analogous to the instant case.

In Re Williams, 298 N.Y.S. 883.

In Re Rothman, 118 N.E. 147.

In the *Williams* case, the court stated the principle as follows:

The practice has become recognized and well established that the court, in the absence of a valid objection, should name as a committee of the person and property of an incompetent the choice of the incompetent's next of kin, rather than some stranger, unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve. *In re Rothman*, 263 N.Y. 31, 188 N.E. 147; *In re Foster's Estate*, 254 N.Y. 614, 173 N.E. 890; *Matter of Dietz*, 247 App. Div. 366,

287 N.Y.S. 392; *Matter of Cooper*, 105 App. Div. 449, 94 N.Y.S. 270; *In re Lamoree*, 32 Barb. 122.

This has long been acknowledged as a salutary rule, and there should be no departure from the practice, except for a good and valid reason. We find no sufficient explanation why this rule was not followed in the instant case. As is pointed out by Judge Hubbs in *Re Rothman*, 263 N.Y. 31, at page 33, 188 N.E. 147, the disregard of the principle, and the arbitrary appointment of one selected by the court over the wishes of the relatives of the incompetent, can only lead to criticism of the court, and resentment by the parties most interested in the proceeding. The welfare of an incompetent is a matter of public concern, and should be given most careful consideration. As a general rule, those nearest to such a one are deeply concerned in his comfort and care, and their counsel and advice should not be ignored or overlooked. Of necessity a committee must maintain more or less intimate relations with the relatives of his ward, and their wishes as to the personnel of the committee, unless they clash with the well being and happiness of the incompetent, should be controlling.

For the reasons stated, we think that the order appealed from should be reversed in so far as it relates to the naming of the committee.

The two intervening sisters, Lucy K. Ward and Kathleen Ward, whose request to be considered by the court for appointment was summarily denied without any investigation whatsoever, own extensive property jointly with Hattie Kulamanu Ward. The appointment of the Hawaiian Trust Company, the nominee of the other two sisters, left appellants Lucy K. Ward and Kathleen Ward helpless to deal with a substantial portion of their own property without the consent of a corporation to whose appointment they voiced strong objections, and whose counsel and whose agents were strongly antagonistic to them personally, as is shown by this record.

In addition to the joint property, it appears that appellants Lucy K. Ward and Kathleen Ward own approximately 40% of the shares in the family corporation, Victoria Ward, Limited, and that Hattie Kulamanu Ward, the alleged incompetent, owns 23% of the stock of this family corporation. The appellee sisters, on the other hand, who sought to declare Hattie Kulamanu Ward insane and to secure the appointment of the Hawaiian Trust Company, together own only 17% of the stock of the family corporation. Thus, appellees, who were minority stockholders, were able to wrest the control of the family corporation from existing management by the device of seeking a guardian friendly to them and with connections with other stockholders of the corporation.

The refusal to appoint the nominees of the next of kin in *In Re Dietz*, 287 N.Y.S. 392, was held to be abuse of discretion. In the *Dietz* case as here, the management of a family corporation was involved.

The court said:

In the exercise of jurisdiction of the Supreme Court dealing with the affairs of incompetents, it has long been the rule that strangers will not be appointed as committee of the person or property of the incompetent, unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve.

The same principle has been authoritatively declared as a part of the law of this state in a recent decision in our own Court of Appeals, which states: "A disregard of such principles and the arbitrary appointment of one selected by the court without notice can only lead to criticism of the court and resentment on the part of the next of kin and parties in interest." *In re Rothman*, 263 N.Y. 31, 33, 188 N.E. 147. We think the appointment improvident in the circumstances and warranting revocation.

The facts appearing of record in the *Dietz* case in respect

to the family corporation are set forth in *In Re Pflagher*, 62 N.Y.S. 2d 899, where the court said:

In *Matter of Dietz*, 247 App. Div. 366, 287 N.Y.S. 392, 394, it appeared that the Special Term "without stating any reason, and unsupported by anything in the record" disregarded the wishes of the incompetent's son and of all the adult members of the family as well as of the representative of the infants and of the alleged incompetent herself and named a person of its own choice as an additional member of the committee. An examination of the record and briefs in this case show that the administration of the estate there was involved, entailing among other things, the management of a large business (R. E. Dietz Company) of which the nominees of the next of kin were officers and directors—factors not present in the case at bar where the estate consists entirely of cash and securities and one small piece of real property. It further appeared and was argued that the appointment of an additional member of the committee who would be entitled to full commissions constituted an unjustifiable waste of the assets of the estate. On these facts, the Appellate Division found the "arbitrary appointment of one selected by the court" to be "improvident in the circumstances."

Where the control of a family corporation, as here, turns on the person or corporation selected by the probate judge as guardian, and where there is a dispute within the family which owns the stock of the family corporation, it would seem that the very least that a court of equity could do, under the circumstances, would be to refuse to appoint the nominee of either side, and to select an impartial nominee. This most reasonable request was made to the probate judge at the hearing on the petition for the appointment of a guardian by appellants.

The facts alleged in the verified motion of appellant Lucy K. Ward, concerning the family corporation, show the likelihood that the dispute over the management of the corpora-

tion and not the welfare of Hattie Kulamanu Ward, the alleged incompetent, was the motive for the filing of the petition for the declaration of insanity and for the selection of the Hawaiian Trust Company rather than some other trust company or person as guardian.

B. ERRORS OF LAW AND STATUTORY CONSTRUCTION AMOUNTING TO A DENIAL OF DUE PROCESS OF LAW, OR, IN THE ALTERNATIVE, MANIFEST ERROR, REQUIRE REVERSAL OF THE JUDGMENT AND DECREE OF THE SUPREME COURT OF THE TERRITORY.

It is appellants' contention that errors of law and statutory construction amounting to a denial of due process of law, or, in the alternative, manifest error, require reversal of the judgment and decree of the Supreme Court of the Territory.

Appellants base this contention on the following errors of law apparent on the record in these proceedings:

1. The probate judge erred as a matter of law in appointing a guardian *ad litem* for Hattie Kulamanu Ward, the appointment not being authorized, under these circumstances, by Section 12509, and it being improper as a matter of law to appoint a guardian *ad litem* for an adult before a determination of competency.

Mussi's Guardianship, 64 N.Y.S. 2d 484.

See also *Warrick v. Moore*, 291 S.W. 950, 956.

No consent of Hattie Kulamanu Ward appears of record, nor any evidence that she was given notice of the court's intention to appoint a guardian *ad litem* for her.

2. A finding of personal service on the alleged incompetent and a finding that the alleged incompetent is *non compos mentis* are jurisdictional. Section 12509 requires notice to be served upon the alleged incompetent. Indeed, if it did not, it would clearly be unconstitutional in this respect. Appellees urge that reference to the sheriff's return is sufficient to establish notice.

It has been specifically held that notice is jurisdictional

and must be found as a fact by the court and appear of record in order to sustain the judgment.

In *McElroy v. Pegg*, 167 F. 2d 668, there was no showing to the court or no finding of personal service upon the alleged incompetent. The record did recite that the alleged incompetent appeared in person. Neither did the record find or adjudge that the alleged incompetent was in fact incompetent or incapable of taking care of herself or managing her property. The court said:

On November 7, 1918, the county court of Pontotoc County entered an order appointing N. S. Olivo as the guardian of Harjo. It recited that notice of the hearing was given by posting the notice of application for the appointment of a guardian in three public places in Pontotoc County, Oklahoma. It did not recite that the notice was personally served on Harjo. It recited that Harjo appeared in person. It found that Harjo desired the appointment of Olivo as her guardian but did not find or adjudge that Harjo was incompetent or incapable of taking care of herself or managing her property. . . .

The trial court found that the order appointing Olivo guardian of Harjo was void because (1) notice of application for appointment was not personally served upon Harjo and (2) that there was no finding or adjudication that Harjo was incompetent; that Harjo was not incompetent in fact at the time of the execution of the deed from her to Pegg; that the evidence failed to establish any fraud in the procurement of the deed from Harjo to Pegg; and that the consideration paid by Pegg to Harjo was not inadequate.

. . .

Here, there was no showing of personal service upon Harjo and it was a reasonable inference from the recitals in the order of appointment that notice was not personally served upon Harjo. Moreover, the order of appointment did not find or adjudge the statutory grounds for the appointment of the guardian.

It follows that the order appointing a guardian for

Harjo was void and created no presumption of the incompetency of Harjo.

In *People ex rel Spencer*, 55 N.Y. 1, 4, the court said:

If any facts required to be stated are omitted, all the subsequent proceedings are fatally defective. It does not aid the proceedings that the facts exist, or that they are, in some other way, or at another stage of the proceedings, brought to the knowledge of the officer, or that the statement of them may seem unnecessary in view of the inquiry and adjudication which he is authorized to make. The statute prescribed the proof which is to be presented to the County judge. It is material because the statute requires it. It must be presented in the form and at the time required, or the officer acquires no jurisdiction. (*Vosburgh v. Welch*, 11 J.R. 175; *Adkins v. Brewer*, 3 Cow., 206; *Bloom v. Burdick*, 1 Hill 130.)

See also *Shields v. Shields*, 26 F. Supp. 211, 215.

As appellants construe Section 10060, it does not relieve the court from making findings as to jurisdictional fact.

In *Guardianship of Pratt*, 34 Haw. 935, an alleged incompetent appealed from an order overruling his demurrer to the petition of his daughter for the appointment of a guardian of the property of his estate. The petition alleged that the appellant:

... by reason of advanced age and physical and mental infirmities has been incompetent to understand business affairs or to care for his property and is now *non compos mentis*.

The court pointed out that for the purposes of the demurrer, the allegations of the petition were to be taken as true. The court said:

It could not be successfully maintained that a petitioner in such a case as this need not allege that the person for whom a guardian is sought is insane. How-

ever, that term has a special meaning given it by our statute and includes persons who are "*non compos*." The term "*non compos*" includes those persons whose minds are so worn out by old age as to render them unable to care for their property. (*Matter of Barker*, 2 Johns. Ch. [N.Y.] 232.) The petition before us not only alleges that Mr. Pratt is "*non compos*" but attributes his condition to advanced age and physical and mental infirmities. The petition is not, therefore, subject to the criticism that it fails to allege that Mr. Pratt is insane within the meaning of our statute.

The *Pratt* case does not hold, as appellants understand it, that the court need not find that a person is insane before appointing a guardian. Indeed, Section 12509 specifically says that a guardian may be appointed:

. . . if after full hearing it shall appear to the judge that the person in question is insane.

The *Pratt* case further holds that the court need not appoint the guardian sought by the petitioners. The court said:

. . . It is in fact the common practice for the court to inquire into the suitability of the nominee and if not found suitable refuse to appoint him and appoint a suitable one.

Appellants contend that the probate judge refused to do just this.

3. The probate judge erred as a matter of law in holding appellants Lucy K. Ward and Kathleen Ward had no standing to object. Thus, it has been held that brothers and sisters of an alleged incompetent who were nearest relatives were persons aggrieved and entitled to appeal from a decree adjudging incompetency and appointment of guardian.

In Re Fior, 50 A. 2d 523 (Ohio).

Commonwealth v. Davidson, 112 A. 115 (Pa.)

The right of the next friend to appeal on behalf of the alleged incompetent is clear.

Fulmer v. Wilkins, 37 S.E. 2d 405.

Beil v. Gaertner, 197 S.W. 2d 611.

4. The court erred as a matter of law in holding that the motive of petitioners was not relevant.

Denner v. Beyer, 42 A. 2d 747, 748.

5. A new hearing should be granted if there is any suggestion of cause or any hint of being or prejudice in guardianship proceedings.

Tebout's Case, 9 Abb. Prac. (N.Y. 1859).

Warrick v. Moore Co., 291 S.W. 950.

C. APPELLEES ERRONEOUSLY INTERPRET THE DECISION OF THE SUPREME COURT AND TERRITORIAL LAW IN RESPECT TO SUPREME COURT'S REFUSAL TO CONSIDER APPELLANTS' FIRST SIX ASSIGNMENTS OF ERROR.

Under the law of the Territory, notice of an appeal must be made within ten days and writ of error may be made within ninety days. At the time of the filing of the motion, the time for appeal from the original appointment had run out. The distinction in the scope of the remedy is considered to be that all questions to which exceptions have been reserved may be raised on appeal and that a writ of error reaches only errors of law apparent on the record. The questions raised, however, by assignments of error 1 to 6 before the Supreme Court of the Territory were questions of law and not of fact.

Section 9564 referred to by appellees, and *Feary v. Santos*, 38 Haw. 240, also cited (appellees' brief, pages 20-21), apply to "any findings depending on the credibility of witnesses or the weight of the evidence or any alleged error in the omission or rejection of evidence."

The Supreme Court in its decision stated that the first six assignments of error would not be considered because

they were not made the subject of objection and exception at the time they were purportedly committed (R. 73). The question of whether these six errors injuriously affect substantial rights of the appellees on writ of error is a question of law. Section 9564 authorizes the Supreme Court to correct on writ of error any manifest error which injuriously affects substantial rights. As appellants read and interpret Section 9564 and *Feary v. Santos*, they have no application to questions of law apparent on the record.

While it is true that both Attorney Carlsmith and Attorney Cass stated at the hearing on the petition for the appointment of a guardian that they did not require any further evidence on the issue of competency, this statement could not constitute an acquiescence by Hattie Kulamanu Ward, through Lucy K. Ward, her next friend. Moreover, Lucy K. Ward on the return day of the verified motion offered to prove that her attorney disregarded her instructions.

Clearly, there was no acquiescence either on behalf of appellants Lucy K. Ward and Kathleen Ward as to the appointment of the Hawaiian Trust Company. Taking the record as a whole, it is difficult to see how appellees' contention that there was acquiescence in the appointment of the Hawaiian Trust Company can be seriously asserted.

V. APPELLANTS' REPLY TO ARGUMENT UNDER POINT V OF APPELLEES' ANSWERING BRIEF (pp. 27-31).

LUCY K. WARD, AS NEXT FRIEND OF HATTIE KULAMANU WARD, WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE OBVIOUS BIAS AND PREJUDICE AGAINST HER MANIFESTED BY THE PROBATE JUDGE ON THE RETURN DAY TO THE HEARING ON HER VERIFIED MOTION.

Appellants cannot agree with appellees that a hearing before an impartial judge is not one of the fundamental elements of due process of law.

In *National Labor Relations Board v. Ford*, (C.C.A. 6) 114 F. 2d 905, cert. den. 312 U.S. 689, the court said:

We may accept as fundamental, the axiom that a trial by a biased judge is not in conformity with due process of law. *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S. Ct. 437, 71 L. Ed. 749, 50 A.L.R. 1243; *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S. Ct. 651, 56 L. Ed. 1038; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 294, 57 S. Ct. 724, 81 L. Ed. 1093.

If, as appellants believe, a hearing before a patently biased judge is not due process, a litigant taken by surprise at the hearing, as appellant Lucy K. Ward was, surely cannot be denied the right to raise the question. Appellees urge that as a matter of fact no personal bias was shown. The intemperate language of the probate judge towards Lucy K. Ward was not based on any evidence before him. Whatever the attitude of the court might have been towards counsel, and that too appears by the record to have been prejudiced, did not justify the probate judge in attacking the integrity of Lucy K. Ward.

It would seem as a matter of law that the assertion of the Supreme Court that appellant Lucy K. Ward had been given a full opportunity to present her contentions and had

been accorded due process of law, when she was denied any hearing on the merits, cannot be sustained. Indeed, it appears that a hearing on the merits would not, in all probability, have taken any longer than the court's lengthy castigation of Lucy K. Ward and her counsel.

CONCLUSION

Appellants respectfully submit that the decision of the Supreme Court of the Territory of Hawaii, and the judgment and decree based thereon, should be reversed.

Dated: Honolulu, T. H., this 27th day of December, 1951.

Respectfully submitted,

BOUSLOG & SYMONDS

By.....

Harriet Bouslog

Attorneys for Appellants, Lucy
K. Ward, Next Friend of
Hattie Kulamanu Ward, and
Lucy K. Ward and Kathleen
Ward.

APPENDIX I

Appendix I

P. No. 15530

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

In the Matter of the Guardianship
of
HATTIE KULAMANU WARD,
An Incompetent person.

10:00 a.m. Session,
Thursday, December 20, 1951.

Present: HONORABLE CARRICK H. BUCK,
First Judge, Presiding,
O. SEZENEVSKY, Clerk

ANNE R. WHITMORE, Reporter

J. GARNER ANTHONY, ESQ., (Robertson, Castle &
Anthony) Attorney for Petitioner;

MRS. HARRIET BOUSLOG, Attorney for Intervenors
Miss Lucy K. Ward, and Miss V. Kathleen Ward;

W. Z. FAIRBANKS, ESQ., Guardian Ad Litem for
Miss Hattie Kulamanu Ward.

ORAL DECISION OF THE COURT

THE COURT: The issue of the competency of Hattie Kulamanu Ward has been previously adjudicated by another division of this court, and is now being presented to

the Ninth Circuit Court of Appeals for determination, and although the petition herein raises the question of the competency of Hattie Kulamanu Ward, the gravamen of the petition is whether or not Hattie Kulamanu Ward is receiving proper care and attention at this time.

Upon the evidence adduced the Court finds that Hattie Kulamanu Ward is living in her girlhood home; that she is attended throughout the twenty-four hour period of each day and night by capable practical nurses and companions; that she is receiving, and has for a long period of time heretofore received, the best of physical care; and in addition thereto has been provided with amusements and pleasant outings; and, what is more important to the Court's mind, that such care has been and is now administered and supervised with affection by her sisters, Miss Lucy and Miss Kathleen Ward, whom the Court finds in all respects able and willing to continue such care. There does not appear on the evidence any reason to this Court why a guardian of the person should be appointed for Hattie Kulamanu Ward, and the prayer of the petition will be denied.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the Oral Decision of the Court in the above entitled matter with respect to the hearing on Petition for the Appointment of a Guardian of the Person of Miss Hattie Kulamanu Ward before Honorable CARRICK H. BUCK, First Judge of the above entitled Court.

/s/ Anne R. Whitmore
Official Court Reporter

Honolulu, T. H.
December 20, 1951.

No. 12,967

United States Court of Appeals
For the Ninth Circuit

LUCY K. WARD, Next Friend of Hattie
Kulamanu Ward, and LUCY K.
WARD and KATHLEEN WARD,

Appellants,

vs.

LANI W. BOOTH and MELLIE E. HUS-
TACE and HAWAIIAN TRUST COMPANY,
LIMITED, in Its Corporate Capacity
and as Guardian of the Estate of
Hattie Kulamanu Ward,

Appellees.

Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF ON BEHALF OF
HAWAIIAN TRUST COMPANY, LIMITED,
GUARDIAN, APPELLEE.

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312 Castle & Cooke Building, Honolulu, Hawaii,

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ROBERTSON, CASTLE & ANTHONY,

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Of Counsel.

FILED

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No. 12,967

**United States Court of Appeals
For the Ninth Circuit**

LUCY K. WARD, Next Friend of Hattie
Kulamanu Ward, and LUCY K.
WARD and KATHLEEN WARD,

Appellants,

vs.

LANI W. BOOTH and MELLIE E. HUS-
TACE and HAWAIIAN TRUST COMPANY,
LIMITED, in Its Corporate Capacity
and as Guardian of the Estate of
Hattie Kulamanu Ward,

Appellees.

**Appeal from the Supreme Court of the
Territory of Hawaii.**

**BRIEF ON BEHALF OF
HAWAIIAN TRUST COMPANY, LIMITED,
GUARDIAN, APPELLEE.**

JURISDICTION.

This is an appeal from the decree of the Supreme Court of Hawaii affirming the decree of the Circuit Court of the First Judicial Circuit of the Territory

of Hawaii appointing a guardian of the estate of an incompetent.

The jurisdiction of the Circuit Court and of the Supreme Court of Hawaii was founded on Section 81 of the Organic Act (48 U.S.C. 631). Sections 9648, 12500 and 12509, Revised Laws of Hawaii 1945, give the Circuit Court jurisdiction to appoint guardians. Sections 9503, 9551 and 9604, Revised Laws of Hawaii 1945, confer on the Supreme Court jurisdiction to review the decrees of the Circuit Court. The jurisdiction of this Court is invoked under 28 U.S.C., Sec-1293. The judgment and decree of the Supreme Court were entered on May 5, 1951 (R. 104, 105). The notice of appeal was filed and allowed May 17, 1951 (R. 4-16).

STATEMENT OF THE CASE.

The petition for the appointment of a guardian was filed November 23, 1948; it alleged the fact of incompetency of Hattie Kulamanu Ward and prayed for the appointment of Hawaiian Trust Company, Limited, as guardian of the incompetent's estate (R. 21-23).

The court thereupon ordered service of the petition and the order of service on the alleged incompetent (R. 24-25) and both were served upon her (R. 23-24, R. 25).

When the matter came on for hearing on December 14, 1948, Appellant Lucy K. Ward appeared by coun-

sel (R. 106). The court, after interrogating counsel and being advised of the size of the incompetent's estate, concluded that a guardian ad litem should be appointed and continued the hearing to December 28, 1948 (R. 111).

On December 16, 1948, J. Edward Collins, Esq., a member of the bar, was appointed guardian ad litem and by agreement of the parties the matter was continued and thereafter brought on for hearing on January 13, 1949, before the late Justice A. M. Cristy, then second judge of the Circuit Court, First Judicial Circuit.

Appellants appeared by separate counsel and the guardian ad litem appeared in person (R. 118).

Mrs. Lani Booth testified that her sister, Hattie Kulamanu Ward, was 80 years old and had been incompetent since 1935 or earlier; was forgetful; could not remember whom she had talked to on the telephone immediately after hanging up the receiver; could not remember when she was told where she was going; that she could read the newspapers but immediately forgot everything that she read, and that she was unable to manage her property affairs (R. 120-122).

The guardian ad litem reported to the court that he had conferred with the incompetent and her physician and concluded that it was advisable to have a complete psychiatric examination. The examination was conducted by Dr. Richard D. Kepner, a qualified

psychiatrist and alienist with his staff over a period of two weeks (R. 131). The guardian ad litem submitted the report of the findings of Dr. Kepner which had been previously furnished to the parties. The report was offered in evidence and on the stipulation that the doctor would, if called, testify in accordance with his report, the court stated:

All that seems necessary of this report to make a part of this record is that 'In summary it is my opinion that this patient is suffering from organic mental deterioration—on a senile and arteriosclerotic basis—to a very marked degree, with defects in orientation, memory, and judgment which would render her incompetent and unable to properly manage business affairs' (R. 131).

The court then observed that a *prima facie* case of incompetency had been established (R. 132). Counsel for the appellants advised the court that they desired no further proof on the issue (R. 132).

Edward Hustace testified that the incompetent had property in the neighborhood of \$1,000,000 in value and by reason of her mental deterioration was unable to manage her affairs (R. 132-4).

Upon the subject of who should be appointed guardian of the incompetent's estate, counsel for Appellant Kathleen Ward, stated: "We would consent to the appointment of any other trust company" (R. 137). In reply to this statement the court asked: "On what basis would you have any standing to make any ob-

jections? Do you want to prove the Hawaiian Trust Company a conniver in this case?" Counsel replied, "I don't want to have to prove it" (R. 137). The guardian ad litem stated that after investigation he believed the Hawaiian Trust Company, Limited, Appellee, was best qualified to act as guardian (R. 140). The court then asked if there was anything further on the matter of suitability which counsel wished to present (R. 140). Appellants offered no evidence on the question of suitability of the guardian but urged their own appointment. (Appellant Lucy K. Ward had been handling the estate of the incompetent under a power of attorney (R. 125)). To this suggestion, Judge Cristy stated:

The Court would not listen to a petition by any of the sisters to be the property guardians because of the fact that they, being sisters with individual interests in the consideration of property, their interest would naturally be conflicting. It would need no proof (R. 141).

The court then concluded:

* * * So the Court is prepared at this time to rule that the evidence is sufficient to show the necessity of a guardian of the property on the evidence adduced, and the investigation of the guardian ad litem of the situation, and the status of the trust company in the community, unless there be some showing of an adverse interest of such a character as to warrant a real conflict of interests in the handling of the matters by the Hawaiian Trust Company, it is a satisfactory appointee from the Court's viewpoint (R. 142).

An order appointing Hawaiian Trust Company guardian of the estate was entered on January 14, 1949, and letters of guardianship issued the same day (R. 26-27). On March 5, 1949, Appellant Lucy K. Ward discharged her counsel and engaged present counsel (R. 146) who on March 12 filed a pleading which may be summarized as a motion to remove the guardian and to vacate the appointment (R. 31-47).

This pleading is remarkable for its length, for the liberality with which it charges various and sundry persons with fraud, and for the lack of any allegations of fact to support those charges.

An *ex parte* order was signed by Judge Moore of the Circuit Court appointing Lucy K. Ward "next of friend" of the incompetent (R. 30), as well as a temporary restraining order to prevent the guardian from voting the incompetent's shares at any meeting of Victoria Ward, Ltd. (R. 48-49). The annual meeting of this corporation was to be held on March 14, two days after the issuance of the restraining order. The motion was set for hearing on March 16, on the order to show cause (R. 48-49).

A return to the order setting forth the earlier proceedings and affirming its fitness as guardian was filed by Appellee on March 15, 1949 (R. 147). The guardian also moved for the entry of an order directing Appellant Lucy K. Ward to deliver the records belonging to the incompetent which she had previously refused to surrender.

At the hearing on the order to show cause the court stated that the record disclosed a full, open proceeding had been had on the issue of competency, and that counsel for Appellants had indicated affirmatively that they did not desire to explore the subject further (R. 150). The court then pressed counsel for Appellants to state whether she had any evidence indicating that Hattie Kulamanu Ward was competent (R. 152, 153, 157). No such allegation was contained in the motion. The following colloquy is as close as the court ever got to receiving an answer:

The Court. * * * Are you in a position to show this Court that Hattie Kulamanu Ward is competent to manage her own affairs?

Mrs. Bouslog. I am in a position to introduce evidence on which this Court will pass as to the degree of competence of Hattie Kulamanu Ward.

The Court. It is not a question of degree; it is a question of competency or incompetency.

Mrs. Bouslog. I think it is not, Your Honor * * * (R. 157).

Earlier, counsel had stated that she had a statement from Dr. Robert Jacobson in which he concluded that the incompetent was competent to choose who she wanted to manage her affairs although she was unable to manage them alone (R. 153).

Finally, after Mrs. Bouslog stated:

I cannot say to your Honor that we will adduce testimony which shows whether or not there was any necessity for the appointment of a guardian * * * (R. 159),

the court stated that it would not reopen the question of competency, Appellant Lucy K. Ward having been given a full opportunity to be heard on the issue in an earlier proceeding (R. 160).

Turning to the issue of the suitability of the Hawaiian Trust Company as guardian, the court pointed out that the guardian ad litem at the original hearing had reported the Hawaiian Trust Company to be a suitable guardian after full investigation and that counsel for Lucy K. Ward had even said that no bond would be necessary from their point of view (R. 161).

After an assertion (R. 165) by Mr. Bouslog that the purposes of Victoria Ward, Ltd., and Hawaiian Trust Company were adverse, the court attempted to ascertain from her if Victoria Ward, Ltd., was a trust company (R. 165). The court finally received a negative answer after the question had been put ten times (R. 170).

Counsel again asserted an inherent conflict from the nature of the companies and then stated that Hawaiian Trust Company had indicated it intended to put one of its officers on the board of Victoria Ward, Ltd. (R. 171).

The court asked:

May I stop you right there and ask you what else could it do? Hattie Kulamanu Ward, who is listed as a director in your own pleadings here, has been declared incompetent, and she owns practically a third or fourth of the stock. What else could the guardian do? (R. 171).

The court then stated that the record indicated a full hearing had been had in the original proceedings on the issue of competency and on the suitability of the guardian; that on both issues counsel for Lucy K. Ward had acquiesced in the findings; that the small stock holdings of Lani Booth and Mellie Hustace in Hawaiian Trust Company alleged in the motion would have made no difference even if known, since no conspiracy to which Hawaiian Trust Company was a party had been in any way indicated in the motion; and that the allegations did not indicate anything in the way of misconduct by the guardian but only indicated that it was acting in accordance with its duty (R. 174-176).

The court called attention to the purchase of the Molokai Ranch in 1947 at a time when the evidence indicated that Hattie Kulamanu Ward was incompetent and said that it was a transaction which the guardian should look into (R. 176). The court then vacated the appointment of Lucy K. Ward as "next of friend," dissolved the temporary restraining order, denied the motion to vacate the appointment and assessed counsel fees against Appellant Lucy K. Ward in the sum of \$100 (R. 51).

On motion for the delivery of records, the Court ordered joint records made available for inspection by the guardian and ordered those reflecting exclusively the business of the incompetent turned over to the guardian (R. 223).

Appellant Lucy Ward appealed from this order (R. 52) and a month later she and Appellant Kathleen V. Ward sued out a writ of error from both that order and the order appointing the Hawaiian Trust Company, Limited, as guardian (R. 53, 54). The first six assignments of error deal only with alleged errors in the original proceedings while the last five deal with alleged errors in the proceedings on Appellant's motion to remove the guardian or vacate the appointment (R. 55-59). The appeal and the writ were consolidated for briefing and hearing by stipulation (R. 61, 62).

It will be noted that nowhere in the assignments of error before the Supreme Court of Hawaii is Appellants' claim that the guardianship statute (R.L.H. 1945, Section 12309) is unconstitutional, or their claim that there was no finding of notice to the incompetent, or their claim that there was no finding of incompetency, raised.

The Supreme Court of Hawaii, after argument, held that there had been service of notice upon the incompetent (R. 65) and that the guardianship statute was constitutional since a jury trial was not mandatory, a guardianship proceeding not being a "suit at common law" within the meaning of the Seventh Amendment (R. 68-72). The court further held that the first six assignments of error not having been called to the attention of the trial judge and not having been made the subject of objection and exception therein could only be considered if they involved errors patently

appearing on the record and constituting manifest error substantially affecting the rights of the parties (R. 73). The court found no such error but found that the proceedings were strictly in accord with the provisions of the statute and constituted due process under the 5th amendment (R. 73, 74).

The court then held that R.L.H. 1945, Section 12529, permitted removal of a guardian only for grounds which arise after the appointment; that the motion to remove stated no such grounds and hence that the denial of the motion without hearing was proper (R. 75-78).

Considering the motion as one to vacate, the court held that the granting of a hearing on such a motion was a matter for the sound judicial discretion of the court, counsel for Appellants having conceded such on oral argument. After alluding to the fact that the trial judge denied this motion after being fully advised of the facts by counsel and the fact that he was acting in the light of the original proceedings and the conclusionary allegations in the motion, the Supreme Court held that there had been no abuse of discretion by the trial judge (R. 78, 79).

Finally, the court considered the charge that the trial judge was guilty of such bias and prejudice as to deprive Appellants of a fair trial and due process of law, and stated that the record indicated that all parties had had a fair and full hearing, that the matter had been correctly disposed of, and that Appellants had been accorded due process of law (R. 79, 80).

STATUTES.

The pertinent provisions of the statutes are printed in the appendix.

SUMMARY OF ARGUMENT.

A proceeding for the appointment of a guardian of the estate of an incompetent is not a suit at common law requiring a trial by jury under the Seventh Amendment.

The settled practice of the Supreme Court of Hawaii in reviewing the judgments of the inferior tribunals of Hawaii will not be disturbed in this Court in the absence of a showing of manifest error. The Supreme Court of Hawaii committed no manifest error in its construction of Sections 9564, 12509 or 12529, R.L.H. 1945. Nor did the court commit manifest error in holding that there was no substantial error in the record of the original proceedings in the Circuit Court or any abuse of discretion in denying Appellants' motion to vacate the appointment, nor in holding that the trial judge had accorded Appellants due process of law.

ARGUMENT.

PROCEEDINGS FOR THE APPOINTMENT OF A GUARDIAN IN HAWAII ARE NOT "SUITS AT COMMON LAW" WHICH REQUIRE A TRIAL BY JURY (ASSIGNMENT OF ERROR NO. 4).

Appellants assert that Section 12509 of the Revised Laws of Hawaii, 1945, violates the Fifth and Seventh Amendments to the Constitution of the United States because it does not provide for a trial by jury of the issue of competency in a guardianship proceeding.¹

This issue was raised for the first time in Appellants' brief in the Supreme Court of Hawaii. It was not mentioned in the trial court (R. 68) nor assigned as error in the writ below (R. 55-59). Nevertheless the Supreme Court of Hawaii considered and rejected the contention.

The contention that the Fifth Amendment is violated by a statute not providing trial by jury of the issue of competency is disposed of by the Supreme Court of the United States in *Montana Co. v. St. Louis Mining Co.*, where it was stated:

A jury trial is not in all cases essential to due process of law. *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272; *Palmer v. McMahon*, 133 U.S. 660. Equity proceeds to final determination of the most important rights without a jury, and nothing is more common than a new proceeding established by statute to be carried on without the aid of a jury, as, for instance, proceedings by

¹It is significant that the statutes on guardianship have existed for almost 100 years in substantially the present form, but this is the first time their constitutionality has been challenged (Civil Code Hawaii 1859 ch. XXIX).

the state * * * to appoint guardians of insane persons. *Gaston v. Babcock*, 6 Wisconsin 503.
* * * 2

Appellants' main contention on this point is that the Seventh Amendment requires a jury trial. That amendment reads in part:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *"

As the Supreme Court of the United States has pointed out, the application of the amendment is:

limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law.³

And again in *Parsons v. Bedford*,⁴ the court said:

The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority.' &c., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and

²*Montana Co. v. St. Louis Mining Co.*, 152 U.S. 160, 171 (1894); see also: *Simon v. Craft*, 182 U.S. 427, 437, (1901); *United States v. Louisiana*, 339 U.S. 699 (1950); *In re Atcherly*, 19 Haw. 535 (1909).

³*Shields v. Thomas*, 18 How. 253, 262 (1856).

⁴3 Pet. 433, 446-7 (1830).

that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.

The issue is, then, simply one of whether a proceeding such as this is a proceeding legal in nature.

Appellants cite no case holding that an insanity proceeding is an action at law.

In olden times an insanity proceeding was commenced when the Chancellor under the sign manual of the King issued a writ *de lunatico inquirendo* to a jury to determine the question of sanity.⁵ Whether equity had some inherent power to act in this field, or whether all the Chancellor's powers were derived from the royal prerogative under 17 Edw. II, ch. 9, 10, is

⁵2 Story, *Equity Jurisprudence*, Section 1365 (1870); 1 Blackstone's Commentaries, 303; *Sporza v. German Savings Bank*, 192 N.Y. 8, 84 N.E. 406 (1908).

disputed.⁶ Probably the procedure in most colonies at the time of the revolution, if they had a procedure, included a jury, though some may have not.⁷ That such proceedings are equitable and not legal in nature has been repeatedly noted.⁸ The statutes of the District of Columbia expressly provide for proceedings such as these to be handled in equity.⁹

A "trial by jury" as contemplated by the Seventh Amendment is a trial by a common law jury. *Capital Traction Company v. Hof*.¹⁰ The court there defined "trial by jury" as—

not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on the facts and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence (174 U.S. 13-14).

Thus the Maryland procedure calling for an inquiry by a jury before a sheriff in *In re Bristor's Estate*,¹¹ the New York procedure including a jury which in-

⁶Story, *op. cit.* Section 1362 et seq.

⁷*Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921).

⁸2 Story, *Equity Jurisprudence* (10th ed.), Section 1362, et seq.; *Gaston v. Babcock*, 6 Wis. 490 (1857); *Sporza v. German Savings Bank*, 192 N.Y. 8, 84 N.E. 406, 409, 413 (1908).

⁹*Barry v. Hall*, 98 F. (2d) 222 (C.A.D.C. 1938).

¹⁰174 U.S. 1 (1899).

¹¹115 Md. 614, 81 A. 25, 29 (1911).

formed the conscience of the chancellor,¹² the New Jersey practice which utilized juries ranging from 23 to 12 men at various times,¹³ the Vermont practice providing for the use of a jury in the discretion of the Supreme Court,¹⁴ the Alabama practice providing for majority verdicts and hearings before a sheriff,¹⁵ and the Tennessee practice providing for a jury proceeding before a sheriff,¹⁶ all relied on by Appellants, did not provide for a common law jury. A jury of inquiry such as was known in England before the revolution was not a common law jury.¹⁷

As we have noted, the statutes of the District of Columbia do not provide for a common law jury and neither do the statutes of Alaska,¹⁸ nor did the statutes of the territories of Missouri,¹⁹ Wisconsin,²⁰ or Oklahoma.²¹ To belabor the point further is needless. An inquiry into lunacy is not and has never been a proceeding at common law and has never followed the modes and forms of the common law. The fact that such proceedings were well known to the common law at the time the constitution was adopted does not make them "suits at common law."

¹²*Sporza v. German Savings Bank*, 192 N.Y. 8, 84 N.E. 26, 409 (1908).

¹³*In re De Hart*, 51 N.J.Eq. 611, 28 A. 603 (1894).

¹⁴*Shumway v. Shumway*, 2 Vt. 339 (1829).

¹⁵*Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266, 273 (1852).

¹⁶*Johnson v. Nelms*, 171 Tenn. 54, 100 S.W. (2d) 648, 652 (1937).

¹⁷*In re De Hart*, 51 N.J.Eq. 611, 28 A. 603 (1894).

¹⁸Section 6-1-12, Compiled Laws of Alaska 1949.

¹⁹*In re Moynihan*, 332 Mo. 1022, 62 S.W. (2d) 410 (1933).

²⁰*Gaston v. Babcock*, 6 Wis. 490 (1857).

²¹*Ex Parte Dayley*, 35 Okla. 180, 128 Pac. 699 (1912).

It is true that some states have held that under the wording of their constitutions there must be a jury trial, while others have held to the contrary.²² As is pointed out in *Sporza v. German Savings Bank*,²³ these cases turn on the wording of the state constitution. The various holdings under state constitutional provisions are collected in an annotation beginning at 91 A.L.R. 88.

What we are here concerned with, however, is the Seventh Amendment to the United States Constitution, and it is clear that its language renders it inapplicable to the present case.

Appellants, moreover, continue to ignore the fact that a trial of the issue of incompetency by a jury was available to the incompetent under Section 9648(6) of the Revised Laws of Hawaii 1945.

In Hawaii, as elsewhere, trial by jury may be waived in civil cases by actions and conduct, as well as expressly.²⁴ Here with a jury trial available, no demand for such was made either by the guardian ad litem or by Appellants through their various counsel, nor was the subject of jury trial ever even raised until Appellants filed their brief in the Supreme Court of Hawaii.

²²See note: 91 A.L.R. 88.

²³192 N.Y. 8, 84 N.E. 406 (1908).

²⁴*Ah Hing v. Ah On*, 15 Haw. 59 (1903); *Trust Company v. C'abrinha*, 24 Haw. 777, 781 (1919).

That a jury trial of the issue of incompetency can be waived is well settled.²⁵

Here it is clear that there has been a waiver of the jury trial provided by the Hawaiian statutes. In view of their conduct in waiving such a trial, Appellants cannot be heard here to complain of the fact that the jury provided is an equitable jury, for until a demand is refused, or, being granted, the verdict of the jury is ignored, no prejudice is done their alleged rights.

II.

THE SUPREME COURT OF HAWAII COMMITTED NO MANIFEST ERROR IN OVERRULING THE FIRST SIX ASSIGNMENTS IN APPELLANTS' WRIT OF ERROR. (ASSIGNMENTS OF ERRORS NOS. 5 AND 7).

A. MANIFEST ERROR ON THE PART OF THE SUPREME COURT OF HAWAII MUST BE SHOWN.

The rule that this Court will not reverse the Supreme Court of Hawaii except in case of manifest error is well settled²⁶ and this principle is applicable to the construction of territorial statutes.²⁷ It governs this case as to all asserted errors of law and fact, including claimed errors of statutory construction.

²⁵*Re Moynihan*, 332 Mo. 1022, 62 S.W. (2d) 410 (1933); *Sporza v. German Savings Bank*, 192 N.Y. 8, 84 N.E. 406 (1907); *Ferguson v. Ferguson*, 128 S.W. 632 (Tex. Civ. App. 1910); *Johnson v. Nelms*, 171 Tenn. 54, 100 S.W. (2d) 648, 652 (1937); Title 21, Section 314, Statutes of the District of Columbia.

²⁶*Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938).

²⁷*Walker v. O'Brien*, 115 F. (2d) 956 (C.A. 9, 1940); *Pioneer Mill Co. v. Victoria Ward*, 158 F. (2d) 122 (C.A. 9, 1946); *De Mello v. Fong*, 164 F. (2d) 232 (1947); *Meyer v. Territory of Hawaii*, 164 F. (2d) 845 (C.A. 9, 1947); *Carey v. Hilo Finance & Thrift Co.*, 170 F. (2d) 236 (C.A. 9, 1948).

B. THE SUPREME COURT OF HAWAII CORRECTLY CONSTRUED
SECTION 9564, R.L.H. 1945 (ASSIGNMENT OF ERROR NO. 7).

Appellants sought review below of the proceedings had at the time of the appointment of a guardian only by writ of error. The first six assignments of error below were directed to that proceeding (R. 55-56). As to these alleged errors, not called to the attention of the trial judge nor made the subject of objection and exception and under the settled practice in Hawaii presented no question for review (R. 73).

Appellants' Assignment No. 7 in this Court and part V of their brief are directed to this issue. Appellants, however, misconstrue the holding of the court below. It is obvious, and indeed is the holding of *Cummings v. Iaukea*,²⁸ which they cite, that an error must be one apparent on the face of the record for it to be raised on appeal without having been raised and properly presented in the trial court. The statute, Section 9564, adds the further requirement that the error be one substantially affecting the rights of the parties for there to be a reversal. Thus, when the court required that the errors assigned be either properly raised and preserved in the trial court or else be manifest and patent on the record and of a character substantially affecting the rights of the parties (R. 73), it was but following the requirements of its own decisions and the local statute.

²⁸10 Haw. 1 (1895).

The court did not hold that all errors to be reviewed must be made the subject of exceptions. However, here it is apparent that Assignments Nos. 1, 2 and 6 in the court below go to the weight which should have been given by the trial judge to various bits of evidence in the record on the issue of the fitness of the proposed guardian; that Assignments Nos. 3 and 4 deal with the exclusion on admission of evidence, and that Assignment No. 5 goes, on analysis, to the weight to be given to the evidence then in the record of conflicting interests between Appellants Lucy and Kathleen Ward and the alleged incompetent (R. 125, 137-8).

The statute requires that, as to alleged errors in the exclusion or admission of evidence, exception be taken, and prohibits reversal for alleged errors turning on the weight of evidence or credibility of witnesses. These provisions have been held by the Supreme Court of Hawaii to apply to proceedings at chambers as well as "in term,"²⁹ the court having held that the addition of the phrase "in any term case" by Act 42, S. L. Haw. 1931, did not remove the prohibition of reversals for such errors on writ of error in cases at chambers. The court said:

The new provision is construed to prohibit reversals not only in term cases for all errors therein consistent with its clear literal meaning but also in equity cases for those depicted errors which pertain to both equity and term cases as the context of statutory description permits (38 Haw. 243).

²⁹*Feary v. Santos*, 38 Haw. 240 (1948).

Moreover, a reading of the record shows that Appellants at the hearing on the petition for the appointment of a guardian acquiesced in the findings made by the trial court.

The trial court was charged with determining two issues under Section 12509, R.L.H. 1941: (1) Was Hattie Kulamanu Ward incompetent to manage her property? (2) Was Hawaiian Trust Company, Limited, a fit and proper person to act as guardian?

The record demonstrated clearly that Hattie Kulamanu Ward was incompetent (R. 120-122, 127-130, 131), and also that Hawaiian Trust Company, Limited, was suitable and the best qualified guardian (R. 139-140). On both issues Appellants declined to introduce evidence (R. 132, 137, 138) and thus acquiesced in the record as made. The rule in Hawaii is that acquiescence in the actions of the trial court bars appeal.³⁰

Plainly no manifest error was committed by the court below in its construction of Section 9564.

C. THE SUPREME COURT CORRECTLY HELD THAT THERE WAS NO ERROR IN THE ORIGINAL GUARDIANSHIP PROCEEDINGS (ASSIGNMENT OF ERROR NO. 5).

The court below held on review of the record that the proceedings on the original hearing in the trial court were in strict conformity with Section 12509 and constituted due process of law under the fifth amendment (R. 73).

³⁰*Laupahoehoe Sugar Co. v. Lalakea*, 28 Haw. 310, 327 (1925); *Fukunaga v. Fujino*, 38 Haw. 556, 560 (1950).

Appellants' fifth assignment of error in this Court (R. 11-12) and Section III of their brief attack this holding. In so doing, Appellants cast the whole question in the framework of a due process of law question. It was not so cast in Appellants' assignments below (R. 55-56).

To see what is involved, we must look at the statute under consideration. Section 12509, R.L.H. 1945 sets up the procedure to be followed when a petition alleging incompetency is filed and the appointment of a guardian prayed. The statute provides that:

(1) On the filing of a petition the judge shall cause notice of at least 14 days of the time and place of hearing to be given the supposed insane person and to the husband, wife, parent, child or children of the person.

(2) If it appears on the return day that there is no one within the described class of relatives, he *may* appoint a guardian ad litem.

(3) If after a full hearing it appears to the judge that the person is insane, then he *shall* appoint a guardian.

Appellants have cited no authority for the proposition that the procedure outlined above does not give due process to the alleged incompetent. We submit that none can be found.

(1) Notice was given as required by statute; the case presents no issue of due process.

Appellants argue (Brief pp. 29-32) that the Circuit Court made no finding that notice was given to the

incompetent and that therefore the order was void and denied them due process. This point was not urged in the trial court. Notice was given the incompetent by service of the petition and order as required by Section 12509. The officer's return of service shows that the incompetent was served "by delivering to her personally a true and attested copy thereof" (R. 25) and the Supreme Court so found (R. 65). The return is, of course, prima facie evidence of the fact of service. Section 10060, R.L.H. 1945. The argument of Appellants therefore is frivolous. Even more tenuous is the argument (Brief p. 31) that the appointment of a guardian ad litem was void because of lack of notice to the incompetent. Such an appointment was precisely in accord with Section 12509 which, says the court:

* * * the court may appoint a guardian ad litem to protect the interests of the supposed insane person.

- (2) The alleged errors raised by Assignments 5 (c), (d) (e) and (f) were not reviewable below and hence the Supreme Court correctly sustained the action of the trial court.**

As we have pointed out, the first six assignments of error in the court below turned on weight and credibility of evidence or upon the rulings as to the exclusion of evidence to which no exception had been taken. Under Section 9564, R.L.H. 1945, these assignments could not be entertained by the court below. The same matters are raised here in assignments 5 (c), (d) and (f) attacking the appointment of Appellee Hawaiian Trust Company, Limited, as guardian, which questions obviously turn on weight and credibility of evidence

and assignment 5 (e), which deals with the exclusion of evidence. In refusing to review and reverse the trial court's action on these matters, the court below was following the statutory provisions as to writs of error. Its action was not manifest error or a deprivation of due process.

(3) The trial court found Hattie Kulamanu Ward insane.

This is another of the matters not assigned as errors below and only argued in Appellants' brief.

Appellants begin their argument by what can only be a deliberate omission of any reference to the construction of Section 12509 as settled by *Guardianship of Pratt*,³¹ where it was held that a person whose mind is so worn out by old age as to be unable to care for his or her property is within the meaning of the term "insane person" as used in Sections 12508-12509. After the testimony of Lani Booth and the introduction by stipulation of part of the psychiatrist's report the court orally held that a sufficient showing of incompetency had been made (R. 132) and counsel for Appellants waived further proof (R. 132). Since probate judges do not have to issue written decisions,³² this was a sufficient finding of fact of insanity to meet the requirements of law and due process.

³¹34 Haw. 935, 937 (1939).

³²*Estate of Mansbridge*, 29 Haw. 73 (1926).

III.

THE ARGUMENT THAT THE SUPREME COURT OF HAWAII ERRED IN REFUSING TO REVERSE THE TRIAL COURT FOR THE FAILURE TO VACATE THE APPOINTMENT OF THE GUARDIAN IS WITHOUT MERIT (ASSIGNMENT OF ERROR NO. 6).

On March 12, 1949, Appellant Lucy K. Ward filed a motion to vacate the appointment of the guardian (R. 31-47). The trial court examined the grounds alleged and found them without merit and denied the request. It was conceded below that the motion to vacate the appointment was a matter "within the sound judicial discretion of the probate judge" (R. 78). The Supreme Court quite properly³³ refused to disturb the order of the trial court which in the exercise of its discretion declined to vacate its prior order.

IV.

THE SUPREME COURT OF HAWAII COMMITTED NO MANIFEST ERROR IN CONSTRUING SECTION 12529, R.L.H. 1945 (ASSIGNMENT OF ERROR NO. 8).

The Supreme Court of Hawaii ruled that Appellants' motion to vacate and remove did not state a cause for removal of the guardian under Section 12529, R.L.H. 1945 because the only grounds for removal under that statute were disqualifications and disabilities of the guardian arising after its appointment (R. 75-78).

³³*In re Andrews Guardianship*, 17 Cal. (2d) 500, 110 P. (2d) 399, 402 (1941).

Appellants contend that the Supreme Court erred in this construction. Appellants make no contention, and indeed cannot contend, that the motion stated grounds for removal which would conform to the Supreme Court's construction of Section 12529.

The construction placed on the statute by the Supreme Court of Hawaii is a reasonable one and is not manifestly erroneous, and therefore constitutes no basis for reversal.³⁴

V.

NO BIAS OR PREJUDICE DEPRIVED APPELLANTS OF A DUE PROCESS IN THE TRIAL COURT (ASSIGNMENT OF ERROR NO. 9).

Appellants' eleventh assignment of error in the Supreme Court of Hawaii read as follows (R. 57-58):

That the Circuit Judge at Chambers, * * * manifested such strong bias and prejudice against petitioner Lucy K. Ward * * * that * * * petitioner was denied due process of law * * * and further manifested such bias and prejudice in favor of Hawaiian Trust Company and petitioners as to deny petitioner due process of law and a full and fair hearing.

The assignment alleged only a denial of due process in regard to the motion to remove and said nothing of that motion as a motion to vacate. The Supreme Court, however, chose to regard it as a protest of

³⁴*Lord v. Territory of Hawaii*, 79 F. (2d) 761, 764 (C.A. 9, 1935).

denial of due process on both facets of the motion (R. 79).

The court held, however, that as a matter of law the motions had been correctly disposed of (R. 80) and that therefore it was not necessary to decide whether the trial judge's remarks were or were not justified by the record (R. 80). However, the Supreme Court went on to hold that the record showed Appellant Lucy K. Ward had been given a full opportunity to present her contentions and had been accorded due process of law (R. 80).

It is well established that at common law a personal bias did not disqualify a judge,³⁵ at least where, as in the hearing on the motion to vacate and remove in this case, he is not called upon to decide any issue of fact but only to pass upon questions of law.³⁶ Nor does the existence of personal bias on the part of the judge deprive a party of due process of law. As the Supreme Court of the United States said in *Tumey v. Ohio*:³⁷

All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, *personal bias*, state policy, remoteness of interest, would seem merely to be matters of legislative discretion. (273 U.S. 523). (*Italics supplied*).³⁸

³⁵*Territory v. Eckart*, 31 Haw. 920 (1931); 48 C.J.S., *Judges*, Section 82 (p. 1057).

³⁶*State v. Beard*, 84 W. Va. 312, 99 S.E. 452 (1919).

³⁷273 U.S. 510 (1927); *Trade Commission v. Cement Institute*, 333 U.S. 683, 702 (1948).

³⁸See also: *Smith v. State*, 74 Ga. App. 777, 41 S.E. (2d) 541, 548 (1947), cert. den. 332 U.S. 772.

Since the mere existence of a personal bias and prejudice on the part of the judge does not deprive a party of due process, the court below cannot be said to have committed manifest error by looking at the questions of whether in fact due process and a fair and full hearing had been given and whether the motion had been correctly disposed of, rather than at the question of whether a personal bias had been exhibited by the trial judge.

We have previously demonstrated the correctness of the disposition made of the motion by the trial court. The record (R. 147-184) demonstrates the great patience and meticulous fairness of the trial judge in trying to find out if the conclusions alleged in Appellants' motion to vacate and remove (R. 31-47) had any factual basis and shows the great latitude allowed counsel for Lucy K. Ward in the argument. In view of the record it cannot reasonably be said that the Supreme Court of Hawaii committed manifest error in holding that there had been a full hearing given Lucy K. Ward and that due process was accorded her.

However, because the charge of bias is so completely unfounded in fact and so unfair in nature, we feel compelled to deal briefly with it.

The record speaks for itself, and an extended discussion does not seem required. The trial court, in endeavoring to get at the bottom of the matter, repeatedly sought an answer by counsel as to whether there was any evidence that Hattie Kulamanu Ward was

competent (R. 152, 153, 156, 157) and as to whether Victoria Ward, Ltd., was a trust company (R. 165-170). The evasion with which questions were met can only be described as a studied attempt to infuriate the court. The trial judge exhibited a remarkable patience throughout the proceeding and although he found it necessary to criticize counsel for the Appellants (R. 177, 183, 227), he was careful to state that Miss Lucy K. Ward stood before the court on an even footing with everyone else (R. 227) and that as far as personal care of her sister went, nothing in the record indicated that her conduct had been anything but exemplary (R. 183).

Appellants' contention that the court was biased against Lucy K. Ward is based, aside from exchanges between the court and counsel, on two remarks:

(1) Judge Cristy noted (R. 149-150) that the evidence in the earlier hearing showed incompetency for several years and that an inference of concealment and unclean hands on the part of Lucy K. Ward might be drawn from such facts.

The Hawaiian statute is designed to protect incompetents and anyone who, knowing another is incompetent, undertakes to handle that person's estate without going through the legal machinery that has been set up lays himself open to such an inference, particularly if the estate is large. The remark indicates no prejudice.

(2) The court remarked that the purchase of the Molokai Ranch, the details of which were in

the guardianship files before the trial court, was questionable and should be thoroughly gone into by the guardian (R. 176-177).

It cannot be doubted that the guardian had a duty to inquire into such a transaction. In the earlier proceeding there had been testimony about the transaction (R. 125) and in the light of that testimony and the inventory then in the files of the court such a remark or remainder to the guardian seems highly proper.

In the final analysis, Appellants' charges of bias seem entirely based on the fact that the court below ruled against them. It is, however, an old principle of our law that adverse legal rulings are no basis for a charge of bias and prejudice.³⁹

The record is clear that the trial judge neither had nor exhibited bias and prejudice against Appellants; on the contrary, he dealt with a groundless motion with patience and firmness in the best tradition of the bench.

³⁹*Benedict v. Seiberling*, 17 F. (2d) 831 (1926); *Ex Parte American Steel Barrel Co.*, 230 U.S. 35 (1913).

CONCLUSION.

We submit that the appeal is without merit and that the decree and judgment appealed from should be affirmed.

Dated, Honolulu, Hawaii,
November 26, 1951.

Respectfully submitted,
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(Appendix Follows.)

Appendix.



Appendix

STATUTES.

Section 9564, R.L.H. 1945 provides:

Judgment; no reversal when. The Supreme Court may affirm, reverse or modify the order, judgment or sentence of the trial court. * * * It may correct any error appearing on the record.

* * *

But no order, judgment or sentence shall be reversed or modified unless the court is of the opinion that error was committed which injuriously affected the substantial rights of the plaintiff in error. Nor shall there be a reversal in any term case for * * * any finding depending on the credibility of witnesses or the weight of the evidence or for any alleged error in the admission or rejection of evidence or the giving of or refusing to give an instruction to the jury unless such alleged error was made the subject of an exception noted at the time it was committed. No writ of error shall be quashed for defect of form.

* * *

Section 9648, R.L.H. 1945, provides, in part:

The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts according to law, as follows:

(6) To select and impanel, subject to challenge for cause, by either party, a special jury of inquiry of idiocy, lunacy, or *de ventre inspiciendo*, or in any

other matter to be tried before any of the judges at chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require.

Section 10060, R.L.H. 1945 provides:

Return. In all cases where process of any court of record or not of record or any complaint, order or citation is served by any officer of the court or of the police force including the high sheriff, his deputy, or any sheriff or his deputies, a record thereof shall be endorsed upon the back of such process, complaint, order or citation. Such record shall state the name of the person served and the time and place of service and shall be signed by the officer making the service. And such record shall be prima facie evidence of all it contains and no further proof thereof shall be required unless either party desires to examine such officer; in which case he shall be notified to appear for examination.

Section 12508, R.L.H. 1945 provides:

Definitions. The words "insane person" are intended to include every idiot, non-compos, lunatic and distracted person * * * These words shall be so construed in all the provisions relating to guardians and wards, contained in this or any other statute.

Section 12509, R.L.H. provides:

Notice, hearing and appointment of guardian of insane person. When the relations or friends of any insane person shall apply to any of the judges hereinbefore mentioned to have a guardian appointed for

such person, the judge shall cause notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed. The judge shall also cause notice to be given to the husband, wife, parent, or any child or children of the supposed insane person, if any there be residing within the jurisdiction of the court. In case it shall appear by return of the summons or by affidavit to the satisfaction of the judge that no such person can be found, the judge may appoint a guardian ad litem to protect the interest of the supposed insane person and cause such notice to be given to such guardian ad litem. If after a full hearing it shall appear to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, with the powers and duties hereinafter specified, and, in case of the appointment of a guardian ad litem, provide for the compensation and reasonable and necessary expenses of such guardian ad litem.

Section 12529, R.L.H. provides:

Resignation, removal and death. Where any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, shall become insane or otherwise incapable of discharging his trust, or unsuitable therefor, or where it shall appear to any of such judges that it would be for the best interests of the minor to remove the guardian of its person, any of the judges, after notice to such guardian and to all others interested, may remove him * * *

